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IN THE

Supreme Court of the United States

October Term, 1934.

No. 212.

WEST OHIO GAS COMPANY,

Appellant,

vs.

THE PUBLIC UTILITIES COMMISSION OF OHIO,

Appellee.

BRIEF ON BEHALF OF APPELLEE.

STATEMENT OF THE CASE.

On March 19, 1928, the city of Lima, Ohio, pursuant to the provisions of Section 614-44, 3982 and 3983 of the General Code of Ohio, passed an ordinance fixing the price which the West Ohio Gas Company should be permitted to charge for gas furnished to the consumers within the city during a period of five years from the effective date of the ordinance. The rates so fixed by the ordinance were as follows (R., 88):

90¢ for the first 1000 cubic feet,
80¢ per M c. f. for the next 3000 cubic feet,
75¢ per M c. f. for the next 6000 cubic feet,
55¢ per M c. f. for all over 10,000 cubic feet.

The company thereafter in accordance with the provisions of the Ohio Statutes filed with the Public Utilities Commission of Ohio its appeal from said ordinance and elected, pending the determination of the appeal, to charge the schedule of rates in effect prior to the passage of the ordinance under the provisions of Sections 614-44, 614-45 and 614-46 of the General Code of Ohio. These rates were as follows (R., 88):

$1.25 for the first 400 cubic feet or less per month,
$1.05 per M c. f. for the next 9600 cubic feet,
$1.00 per M c. f. for the next 25,000 cubic feet,
75¢ per M c. f. for all over 35,000 cubic feet.

On July 12, 1928, the commission commenced the hearing on the valuation of the company's property for the purpose of determining its fair value for rate-making purposes, and on January 27, 1932, the commission entered its order fixing the value of the property as of March 31, 1928, the date certain, at $1,901,696.26. (R., 82.)

No appeal was taken from the value so ascertained by the commission and its finding thereupon became final.

The record clearly discloses, however, that the valuation fixed by the commission represents a property far in excess of the needs of the city of Lima (R., 201, 204, 205, 206, 248, 249, 265, 292, 301, 427, 428), and it will be recognized that the valuation made as of March 31, 1928, on the basis of prices then existing, does not represent the real value of the property during the succeeding five years of the ordinance period involved. (R., 478, 511, 512.)

Following the determination by the commission of the value of the company's property used and useful in furnishing gas to consumers in Lima, the commission on

June 7, 1932, began the taking of testimony relating to the operating expenses and revenues of the company for the purpose of ascertaining the return earned by the company. In addition to the testimony introduced by the company the commission, in accordance with the provisions of the Ohio Statutes (G. C. 499-15), entered an order putting in evidence the annual reports of the company filed with the commission for the calendar years 1928, 1929, 1930 and 1931. (G. C. 614-48.)

Thereafter, on March 10, 1933, the commission entered its final rate order in the proceeding supported by its written opinion issued the same day. (R., 85-99).

On May 19, 1933, the commission entered a nunc pro tunc order in the case for the purpose of correcting certain mathematical errors in its original findings. This order being filed in the Supreme Court of Ohio on May 27, 1933. (R., 118-124.) This finding of the commission held that the ordinance rates adopted by the city council of Lima on March 19, 1928, were insufficient to yield a fair return to the company upon the basis of the commission's valuation of the company's property but that the rates being collected by the company were excessive and fixed, pursuant to the provisions of the Ohio Statutes (G. C. 614-46), the following schedule of rates to be charged in Lima during the ordinance period as fair and reasonable. (Com. order, p. 1, R., 86.)

400 cubic feet or less used per month $1.00,

Next 9600 cubic feet or less used per month 95¢ per M c. f.

Over 10,000 cubic feet used per month 75¢ per M c. f.

Penalty for non-payment of bill within 10 days after receipt of bill .05¢ per M c. f.

It will be observed that the foregoing schedule of rates is somewhat less than the rates being collected by the company under bond but considerably higher than the rates provided for in the ordinance.

The company prosecuted error proceedings from the commission's order to the Supreme Court of Ohio and that court on May 16, 1934, affirmed the order of the Commission (*West Ohio Gas Company v. Public Utilities Commission of Ohio,* 128 O. S., 301, R., 14-35).

The case is in this court on appeal from the judgment of the Supreme Court of Ohio affirming the order of the Public Utilities Commission of Ohio.

The History of the West Ohio Gas Company.

In order that this court may have a complete picture of the problems involved a brief recitation of certain additional facts is essential.

The West Ohio Gas Company is an Ohio corporation organized in 1924. It now furnishes gas to eleven Ohio communities of which Lima is the largest, having a population of 42,287. Of the eleven communities served with gas by the West Ohio Gas Company many are served with natural gas (R., 141, 226) but Lima is served with a mixed gas, that is a manufactured gas enriched with natural gas. (R., 129.)

Originally the business district of Lima was furnished with artificial gas. Later natural gas service was furnished the residential consumers by a separate company. (R., 206-207.) Subsequently, these two gas companies

(Lima Gas Light Company and The Lima Natural Gas Company) came under the control and management of The United Gas Improvement Company of Philadelphia and still later, about 1920 or 1922, these two companies were acquired by the Midland Utilities Company. (R., 149.) Upon the organization of the West Ohio Gas Company in December, 1924, these companies were transferred to the West Ohio Gas Company, the common stock of which in turn was owned by the Midland Utilities Company. (R., 350-352, 396, 402-403.)

The Lima Gas Light Company which manufactured and sold artificial gas in Lima prior to 1924 and The Lima Natural Gas Company which sold natural gas in Lima prior to 1924 were entirely separate corporations (R., 146, 214-229), and each of these companies owned a separate distributing system. The Lima Gas Light Company owning in addition to the distributing system a plant where it manufactured artificial gas (R., 146) and the Lima Natural Gas Company owned a transmission line some forty-four miles in length through which it secured its supply of natural gas. (R., 229, 239, 245.) In 1923 the properties were combined and authority was obtained permitting the furnishing to Lima consumers of a mixed fuel gas. (R., 231.) It is from these combined properties together with replacements and additions that the city of Lima is now furnished with gas by the West Ohio Gas Company. (R., 215.)

At this point it is perhaps desirable to explain a little more fully the transmission line formerly owned by the Lima Natural Gas Company and which is now a part of

the physical property of the West Ohio Gas Company. This transmission line is approximately forty-four miles in length and extends east of the city of Lima, and is used for the purpose of transporting natural gas to Lima and other communities served by the West Ohio Gas Company. (R., 129.) It connects with a supply of natural gas adequate to provide the city of Lima with natural gas. (R., 198, 409.) This transmission line constituted one of the major items in the valuation of the company's property (R., 126) and has a capacity sufficient to supply a city with a population much greater than that of Lima with natural gas. (R., 427.) The requirements of Lima being somewhat in excess of 1,000,000 cubic feet per day. (R., 261, 371.) The manufacturing plant is also sufficient to supply a much larger demand than exists in Lima (R., 201, 204, 205, 206, 248, 249, 265, 292, 427, 428) for the reason that the manufacturing plant alone has a capacity of some 3,000,000 cubic feet per day (R., 265) so that it is at once apparent that the facilities existing by virtue of the transmission line are sufficient to supply a city much larger than Lima with natural gas and that the manufacturing plant is also sufficient in capacity to supply a city much larger than Lima with manufactured gas. A combination of the two facilities in one company of course creates an even greater overcapacity.

The West Ohio Gas Company was organized in 1924 for the purpose of acquiring the ownership of the two separate companies, The Lima Gas Light Company and Lima Natural Gas Company, which had been operating

in Lima prior to that date as well as for the purpose of acquiring certain additional small gas companies in the same general territory. The common stock of the West Ohio Gas Company is owned by the Midland Utilities Corporation of Chicago (R., 218) and the Midland Utilities Corporation is in turn a part of a larger corporation in the Insull organization. (R., 218.) As a matter of fact, prior to 1924 when the West Ohio Gas Company was organized, the Insull interests had acquired the Lima Natural Gas Company, The Lima Gas Light Company, and several other small gas companies in that immediate territory, and The West Ohio Gas Company was organized for the purpose of acquiring these separate companies and combining them into one organization. (R., 403.) This was in December, 1924. The West Ohio Gas Company then proceeded to issue certain securities against the properties they had acquired. The securities so issued consisting of $1,000,000 in bonds, $750,000 in preferred stock, and $1,626,381 in common stock. (R., 396, 398.) Since the original issue of securities by the company they have issued an additional $300,000 in bonds. (R., 399.) The common stock, with the exception of the qualifying shares, was held by the Midland Utilities Company of Chicago, Mr. Samuel Insull, Jr., being president of that company. The preferred stock was also acquired by the Midland Utilities Company at 87½. (R., 513.) The bonds were sold in the open market. (R., 391.)

During the ordinance period which is here involved the company purchased natural gas from the Ohio Fuel Gas Company under a contract calling for a purchase

price of 55¢ per M c. f. (R., 435.) The natural gas so purchased from the Ohio Fuel Gas Company was mixed in the company's plant located at Lima with artificial gas manufactured therein and the mixed gas thus produced was then distributed to Lima consumers. (R., 129.)

The cost of manufacturing the artificial gas was found by the commission to be 20¢ per M c. f. (Commission opinion, R., 89, testimony Company Witness Pringle, 233-234, 335). The mixed gas so produced contains 35% natural gas and 65% artificial gas (R., 211, 334) so that the total production cost of the mixed gas is approximately 32½¢ per M c. f. However, the commission allowed 36¢ per M c. f. as the cost of producing the mixed gas, adding 3½¢ per M c. f. to cover incidental costs before distribution, and leakage during distribution (Commission opinion, R., 89, 90).

It should be noted that the mixed gas so produced has a B. T. U. content of approximately 550 (R., 144, 254) as compared to a normal B T. U. content of about 1000 in natural gas. In other words, the heating qualities of the mixed gas is only slightly in excess of 50% of the heating content of natural gas. (R., 195, 196.)

There is ample evidence in the record to indicate that the average B. T. U. content of the mixed gas does not exceed 476. (R., 188-198—City Exhibits 9a, b, c, d and e).

We do not believe it can be seriously urged that the cost of producing the mixed gas ready for distribution greatly exceeds the 36¢ per M c. f. allowed by the com-

mission (R., 334-421) and we believe it is equally true that the average cost of gas to the consumer in Lima under the company rates is about $1.29 per M c. f. (Commission opinion, R., 90) which is a higher rate than other communities similarly situated are paying (R., 273).

Twenty years ago natural gas with a B. T. U. content of about 1000 was distributed in Lima by this company's predecessor at a retail price of from 30¢ to 33¢ per M c. f. (R., 355). The cost of this gas to the distributing company was about 20¢ per M c. f. and there was left for the cost of distribution and profit to the distributing company the sum of about 12¢ per M c. f. Today gas with only slightly in excess of 50% of the B. T. U. content is distributed in Lima. The cost of this gas is 36¢ per M c. f. and the distribution expense including the return on investment is about 93¢ per M c. f.

Consequently, it would seem that in spite of protests of counsel for the company, that the cost attributable to distribution of gas from plant to consumer in the city of Lima, Ohio, is about 93¢ per M c. f. and such was the finding of both the commission (Commission opinion, R., 90) and of the Ohio Supreme Court (R., 18).

The Difference Between the Commission and the Company.

The differences between the company and the commission arise by virtue of certain reductions made by the commission in the amounts claimed by the company for operating expenses. These differences computed on the basis of the average for the four years 1928, 1929, 1930 and 1931 of the five year ordinance period and being the years with complete figures available to the commission

at the time it began its investigation, aggregate $77,-384.00. That is, the commission reduced the operating expenses claimed by the company an average of $77,-384.00 a year for the four year period of the ordinance for which complete figures were available to the commission. The entire reduction in average annual operating expenses for the city of Lima for the years 1928-1931, both inclusive, and the items involved therein are shown by the following table:

TABLE No. 1.

DIFFERENCES IN EXPENSES BETWEEN COMPANY AND COMMISSION

Description.	Average Annual Expenses for City of Lima for Years 1928-1931, Both Inclusive		
Expenses:	Company	Commission	Difference
1. Cost of gas sold	$150,362	$146,575	$3,787—
2. Distribution expense	40,622	34,428	6,194—
3. Commercial expense	20,804	19,719	1,085—
4. New business expense	12,110	5,000	7,110—
5. General and miscellaneous expense	47,558	39,235	8,323—
6. Indirect charges to construction—Cr.	(3,825)	(3,804)	21+
7. Retirement allowance	52,539	24,518	28,021—
8. Amortization of pipe line	22,936	.....	22,936—
9. Real and personal property taxes	22,767	22,797	30+
10. State of Ohio—excise tax	7,108	7,114	6+
11. Tax of Public Utilities Commission of Ohio	278	278	.....
12. Federal income tax	8,494	8,504	10+
13. Uncollectible accounts	2,441	2,446	5+
14. Total	$384,194	$306,810	$77,384—

Note: ( ) indicates red figures.

See Appendix "A", page 92, post.

The next table shows the gross revenues from gas service in Lima which would be earned under the rates fixed by the commission. This table shows the gross revenues of the company for gas service in Lima for each of the years 1928, 1929, 1930 and 1931. It also shows the average cost for the four year period. The table shows the expenses as set forth in the commission's corrected findings. These expenses are shown in detail together with a total for each of the years 1928, 1929, 1930 and 1931, and with the average for the four year period. The table then shows net income for each of the four years together with the rate of return and the average. From this table it will be observed that upon the basis of the gross revenues as shown by the company and upon the basis of the expenses as allowed by the commission, corrected as to all mathematical and other errors, and upon the basis of the commission's valuation of $1,901,-696, the company earned for the year 1928 a minimum return of 6.37%; for the year 1929 a return of 5.78%; for the year 1930 a return of 5.88%; a return for the year 1931 of 4.99% and an average for the four year period of 5.75%.

TABLE No. 2.

RATE STUDY

	Year 1928	Year 1929	Year 1930	Year 1931	Average 4 Years
Quantity					
1. M c. f. of gas sold in Lima	395,423.3	399,309.5	380,297.5	354,148.8	382,294.8
Revenues					
2. Gross revenues from gas service in Lima under commission's rates	$432,097	$434,876	$412,995	$384,931	$416,225
Expenses					
3. Cost of gas sold	145,004	153,448	149,143	138,704	146,575
4. Distribution expense	36,265	35,151	31,643	34,651	34,428
5. Commercial expense	20,567	19,363	19,240	19,707	19,719
6. New business expense	5,000	5,000	5,000	5,000	5,000
7. General and miscellaneous expense	37,854	45,974	40,237	32,877	39,235
8. Indirect charges to construction—Cr.	(1,827)	(2,588)	(8,400)	(2,401)	(3,804)
9. Depreciation	24,518	24,518	24,518	24,518	24,518
10. Real and personal property taxes	23,353	24,889	23,121	19,826	22,797
11. Ohio excise tax	7,034	7,382	7,259	6,782	7,114
12. P. U. C. O. tax	286	282	265	280	279
13. Income tax	10,144	8,867	6,878	8,127	8,504
14. Uncollectible accounts	2,768	2,753	2,238	2,034	2,446
15. Total expenses	$310,966	$325,039	$301,132	$290,105	$306,811
Net Income					
16. Net income, line 2 less line 15	$121,131	$109,897	$111,863	$94,826	$109,414
Rate of Return					
17. Based upon commission's valuation of $1,901,696 as of March 31, 1928, and the net income shown on line 16	6.37%	5.78%	5.88%	4.99%	5.75%

Note: ( ) indicates red figures.

See Appendix "A", page 92, post, which shows that the above percentages are the minimum rates of return that would have been earned by the company under the commission rates and that a higher rate of return probably would have been earned.

The commission's reduction in the various operating expenses which were claimed by the company together with the reduction in the rate of return to which the company felt it was entitled, resulted in a somewhat lower schedule of rates. Consequently, this case turns primarily upon the reasonableness of the reductions made by the commission in the operating expenses as claimed by the company and the reduction in the rate of return (8%) contended for by the company.

A summary of the difference in the contentions of appellant and appellee is contained in the decision of the Supreme Court of Ohio in this case. (*The West Ohio Gas Company v. The Public Utilities Commission of Ohio,* 128 O. S., 301, R., 21, 22). The historical development of the case is more fully set forth in the various orders of the appellee (R., 71-73, 82-99, 100-117, 118-124).

Specification of Assigned Errors Intended to Be Urged.

Under the foregoing heading at p. 29 of its brief (appelant's brief, p. 29) appellant recites that the assignment of errors contained twenty-seven paragraphs (R., 58-63) and that all of the assignments of error are to be urged, and that the several assignments of error relate to the findings and order of appellee (affirmed by the Supreme Court of Ohio) in (1) using the annual reports of the company filed with the commission pursuant to the provisions of Ohio Law (2) reducing the operating expenses claimed by the company (3) denying to the company a rehearing and (4) the contention that the Supreme Court of Ohio did not make an independent judicial review of the law and the facts.

SUMMARY OF ARGUMENT.

I.

THE EFFECT OF THE COMMISSION'S ORDER, AFFIRMED BY THE STATE COURT, ON THE EARNINGS OF THE COMPANY.

The rates prescribed by the commission for gas service furnished by the company to the consumers of Lima upon the basis of the actual gross income collected by the company during the four years of the ordinance period for which the figures were available would have produced an average return of 5.75% on a valuation made at 1928 prices for a property having a capacity far in excess of the needs of the community.

II.

APPELLANT'S OPERATING EXPENSES.

The amount allowed appellant for its total annual operating expenses was generous.

The difference in the average annual operating expenses as claimed by appellant and as allowed by appellee for the four year period 1928-1931, inclusive, and being the period for which information was available to the commission at the time it prepared its finding in this matter, corrected as to all mathematical errors, is $77,384.00. Of this total difference $28,021.40 results from

a reduction in the retirement allowance, that is, a reduction in the annual allowance for depreciation made by appellee under the amount claimed by appellant. $22,935.97 results from the refusal of the appellee to allow the amortization claimed by appellant on a 44 mile transmission line used for the purpose of transporting natural gas from the source of supply to the city of Lima. These two items total $50,957.37 and represent all but $26,426.56 of the entire reduction in appellant's operating expenses as made by appellee. The other items reduced and the amounts thereof are as follows: Gas produced and purchased (cost of gas sold) $3787; distribution expense $6194; commercial expense $1085; new business expense $7110; general and miscellaneous expense $8323.00. The importance of determining the proper amount to be allowed as operating expenses has been recognized by this court in the recent case of *Lindheimer v. Illinois Bell Telephone Company*, 292 U. S., 151, 54 S. Ct., 658, 78 L. Ed., 1181 (1934).

Gas Produced and Purchased (Cost of Gas Sold)—The reduction in this item is occasioned by the commission's reducing the amount claimed for unaccounted-for gas from 9% to 7%. It is submitted that an allowance of 7% for losses through unaccounted-for gas is ample and sufficient based upon the knowledge and experience of an administrative commission informed as to such matters and, in fact, is a greater allowance than has

been claimed by or allowed to other gas companies before the commission in recent rate cases:

In the Matter of the Complaint and Appeal of the Columbus Gas & Fuel Company From an Ordinance of the City of Columbus, Ohio, to Fix the Price that May Be Charged for Natural Gas in the City of Columbus, Ohio, No. 5935;

Columbus Gas & Fuel Company v. Public Utilities Commission of Ohio, 127 O. S., 109, 187 N. E., 7;

Columbus Gas & Fuel Company v. Public Utilities Commission of Ohio, 292 U. S., 398, 54 S. Ct., 703, 78 L. Ed., 1327.

In the Matter of the Complaint and Appeal of The East Ohio Gas Company, No. 7130, Before the Public Utilities Commission of Ohio, decided September 19, 1934.

Distribution Expense—Distribution expense includes such items as superintending distribution of gas, work on customers' premises in connection with service, changing meters to measure gas sold, maintenance of local distributing mains, service and meters. The difference between the amount claimed by the company for this item and the amount allowed by the commission rests entirely upon a different method used in computation. It is necessary that this expense for a company serving several communities be allocated to the community which is involved in the rate litigation. The commission chose the method of allocating this expense upon a per customer basis. The company insists that it should have been allocated on a gas consumption basis. We believe, however, that where the company's total distribution expense is accepted without question by the commission and allocated on a per customer basis to the

various communities served by the company a fair distribution expense has been allowed to the company. Certainly this court will not be concerned with the method selected by an administrative commission in allocating this expense so long as it represents a fair and reasonable one and the method so selected should not be disturbed simply because the company feels that it would have been better satisfied with the use of another method. The method as used by the commission was approved by the Supreme Court of Ohio in *West Ohio Gas Company v. Public Utilities Commission of Ohio*, 128 O. S., 301.

Commercial Expense—The commercial expense was likewise allocated to the particular community involved in this litigation upon the basis of a per customer average. The difference between the amount contended for by the company and the amount allowed by the commission is slight and we again submit that where the company's total commercial expense is accepted without question by the commission and allocated to the various communities served by the company on a consumer basis a fair and reasonable commercial expense has been allowed to the company and we do not believe that this court is concerned with the method of allocation so long as the result achieved is fair.

Los Angeles Gas and Electric Corporation v. Railroad Commission of the State of California, 289 U. S., 287, 77 L. Ed., 1180.

New Business Expense—The company insists that the commission was bound to accept the amount which it alleged that it had expended for the purpose of securing

new business. The amount for which the company was contending was considerably higher during the four year period which is involved in this rate litigation than had been expended by the company in previous years and the evidence did not disclose that any substantial beneficial results had been obtained from this expenditure. In fact, the record indicates that the most effective aid to the securing of new business on the part of this company would have been a reduction in its rates. Certainly an administrative commission is not bound to include in the operating expenses claimed by a public utility an arbitrary amount which may have been expended for the securing of new business where the circumstances do not warrant the expenditure of the amount claimed and the results are unsatisfactory.

General and Miscellaneous Expense—The differences between the company and the commission relating to general and miscellaneous expense aggregate $8323.00 annually. A large part of this difference arises by virtue of the disallowance on the part of the commission of rate case expense. The remainder arises by virtue of the commission method of allocating this expense upon a per customer basis as opposed to the company's contention that it should have been allocated upon a gas consumption basis. It is admitted by the company that general and miscellaneous expenses are incurred generally by the company as a whole and include the expense of administration and other costs that have to do with the administration of the company. Certainly under the circumstances and where the company's general and

miscellaneous expense is accepted by the commission without question and allocated to the various communities served by the company on a per customer basis, a fair and reasonable general and miscellaneous expense has been allowed to the company. As a matter of fact, the allowance on the part of the commission for this particular item was exceedingly generous for it permitted the inclusion without any reduction whatsoever of amounts spent by the company for contributions for sustaining chambers of commerce, local charitable contributions, membership dues in national and state utility associations and traveling expenses to their conventions as well as an allowance of more than $4450.00 a year for services supposedly rendered by the parent company. Many of these allowances under the law should have been excluded from the operating expenses.

Re New York Telephone Company, P. U. R., 1932D, 20 (1932) (New York Public Service Commission);

Re New York Telephone Company, P. U. R., 1933C, 409 (Interstate Commerce Commission);

Re Lone Star Gas Company, P. U. R., 1932C, 1 (Oklahoma; Re Reservations, Contributions and Donations; Interest During Construction and Property Not Used in Operations [D. C.]), P. U. R., 1930D, 113, 114;

Herring v. Clarks Ferry Bridge Company (Pennsylvania), P. U. R., 1926D, 514, 529;

Idaho Power Company v. Thompson, 19 Fed. (2d), 547, P. U. R., 1927D, 388 (Federal);

Re Citizens Independent Telephone Company (Indiana) (1920), P. U. R., 1930A, 431;

Rock Port v. Clifton (Missouri), P. U. R., 1927E, 470;

Re Crystal City Gas Company (New York), P. U. R., 1925E, 91;
Re Southern California Edison Company, P. U. R., 1924C, 1 (California);
Municipal Gas Company v. Wichita Falls (Texas), P. U. R., 1924B, 410;
Re Idaho Power Company (Idaho), P. U. R., 1924C, 731;
Railroad Commissioners v. Hughes Electric Company (N. D.), P. U. R., 1925A, 18.

Rate Case Expense—The company contended for a rate case expense of $30,607.69 amortized over a period of five years at the rate of $5790.00 per year. This apparently being the total amount of the expense which they have incurred in this particular litigation. Whether the allowance of any amount for rate case expense should be permitted under the circumstances of this case, it is evident that under the law the company is not entitled to insist upon the inclusion of this amount in their annual operating expenses for the purpose of establishing confiscation.

New York & Queens Gas Company v. Newton, 269 Fed., 277;
Reno Power, Light and Water Company v. Public Service Commission, 298 Fed., 790;
Columbus Gas & Fuel Company v. City of Columbus, 17 Fed. (2d), 630;
Public Reports Digest, Volume 2, p. 1553.

State Excise Tax—The company was not injured by the failure of the commission to include in its operating expenses a purely emergency tax passed by the Ohio Legislature and which was effective only during the last year of the ordinance period involved in this case.

Retirement Reserve Allowance—The annual depreciation allowed by the appellee is ample and sufficient and exceeds the actual experience of the company for this item. The company insists upon an allowance of $53,639 a year to cover its annual depreciation requirements. Presumably this allowance represents 3% of the total depreciable property. The commission allowed for this item the sum of $24,518.04, being 1.4% of $1,751,288.60 of depreciable property as of March 31, 1928. The actual experience of the company over a seven year period from 1925 to 1931 showed an annual depreciation of 9/10 of 1% and on the basis of that charge the company has been able to accumulate $327,766.87 as an unexpended balance in depreciation reserve and amortization as of December 31, 1931, while at the same time keeping its property, upon the basis of the testimony of its own witnesses, in 100% condition. Certainly when it is considered that the company's property, according to its own evidence, has been maintained in 100% condition and that it would today be impossible "to expend economically and sensibly as much as $200,000.00" on the property to improve it, no justification can be conceived for the company's contention that an annual allowance of 3% is necessary, and particularly is this true when the evidence discloses that the actual experience of the company over a seven year period in the meeting of the expense of depreciation has been less than 1% per year, on the basis of which allowance they have accumulated an unexpended balance in depreciation reserve and amor-

tization reserve as of December 31, 1931, in the amount of $327,766.87.

Smith v. Illinois Bell Telephone Company, 282 U. S., 133, 75 L. Ed., 255;
Dayton Power and Light Company v. Public Utilities Commission of Ohio, 292 U. S., 290, 78 L. Ed., 1267;
Columbus Gas and Fuel Company v. Public Utilities Commission of Ohio, 292 U. S., 398, 78 L. Ed., 1327.

As a matter of fact, the allowance of the commission for annual depreciation consisting of 1.4% of the depreciable property valued at $1,751,288.60 as of March 31, 1928, was not only adequate for this particular item but, in view of the evidence in the record, was exceedingly generous.

The Question of Amortizing the Forty-four Mile Transmission Line—There is not the slightest justification for the inclusion in operating expenses of $22,935.97 a year for the purpose of amortizing a transmission line used to convey natural gas into the city of Lima when it is admitted that the transmission line is used and useful in the company's business and will continue so for an indefinite period in the future and this is particularly true when it is realized that this same transmission line is at the present time maintained by the Ohio Fuel Gas Company under and by virtue of the terms of its contract with the West Ohio Gas Company providing for the sale of gas to the West Ohio Gas Company and that, in addition, the entire value of the line allocable to Lima is included in the base of $1,751,288.80 fixed by the commission as the value of the depreciable property on which the allowance of 1.4% as an annual depreciation charge was computed.

III.

RATE OF RETURN.

A rate of return approximately 6% for the period 1928-1931, inclusive, upon a valuation base as of March 31, 1928, of a property with a physical capacity far in excess of the needs of the community served is a fair and adequate rate of return and in no way confiscatory. In fact, in the light of the circumstances presented a lower rate of return would be justifiable.

The appellant insists that to avoid confiscation of its property it must have an 8% rate of return. This court has repeatedly recognized that what will constitute a fair rate of return is not a matter to be decided by the blind application of percentages but depends upon many circumstances and must be determined by the exercise of a fair and enlightened judgment having regard to all relevant facts.

> *Smith v. Illinois Bell Telephone Company*, 282 U. S., 133;
> *Bluefield Water Works and Improvement Company v. Public Service Commission*, 262 U. S., 679, 67 L. Ed., 1176.

The property of the company devoted to public service in the furnishing of gas to the consumers in Lima, Ohio, is far in excess of the needs of the community. It represents the combined facilities of a natural gas plant and an artificial gas plant either one of which has a capacity

sufficient to supply a community larger than Lima. Very properly the commission might have excluded from the valuation base a large part, if not all, of the plant devoted to manufacturing gas.

Los Angeles Gas and Electric Corporation v. Railroad Commission of the State of California, 289 U. S., 287.

Another circumstance disclosed by the record is that the average rate per thousand cubic feet for gas furnished to the consumers in Lima is exceptionally high and is greater than that being collected in other communities similarly situated. While the cost of gas produced is only 36¢ per thousand cubic feet the average cost to the consumer for the first thousand cubic feet of gas furnished is $1.29. This expense of distribution and profit in the amount of 93¢ per M c. f. is abnormally high when it is compared with the distribution expense of 16¢ per M c. f. approved by this court in the case of the *Columbus Gas & Fuel Company v. Public Utilities Commission of Ohio*, 292 U. S., 398, 78 L. Ed., 1327, and with the distribution expense of less than 20¢ per M c. f. approved by this court in the case of *Dayton Power and Light Company v. Public Utilities Commission of Ohio*, 292 U. S., 290, 78 L. Ed., 1267.

Certainly a utility is not entitled to a large rate of return upon the valuation of a property whose capacity far exceeds the needs of the community when the cost of the product which it sells is so abnormally high as to be almost prohibitive. As a matter of fact, the rate of re-

turn should be adjusted downward when the price of the commodity sold is not reasonable from the viewpoint of the worth of the service.

Smyth v. Ames, 169 U. S., 464; 42 L. Ed., 819; 185 S. Ct., 416;
Whitten and Wilcox, Valuation of Public Service Corporations, 2nd Edition, 1928, Vol. 1, Sec. 60, p. 77;
Re Los Angeles Gas & Electric Corporation, P. U. R., 1917F, 717;
Re Coast Counties Gas & Electric Co., P. U. R., 1924C, 415;
In *Benicia v. Benicia Water Co.*, (1923) 23 Cal. R. C. R., 213;
Re Colorado Springs Light, Heat & Power Co., P. U. R., 1916E, 650;
Belleville v. St. Clair County Gas & Elec. Co., P. U. R., 1915F, 235, P. U. R., 1916B, 24;
Re Central Illinois Public Service Company, P. U. R., 1919E, 910;
Re Illinois Gas Company, P. U. R., 1921B, 430;
In re Kampsville Electric Light & Power Co., (1921) 1 Ill. C. C. R., 51;
Re Indiana Fuel & Light Company, P. U. R., 1921E, 381;
Re Castine Water Company, P. U. R., 1924B, 529;
Re United R. & Electric Co., P. U. R., 1928C, 604;
Donham v. Public Service Commission, P. U. R., 1919C, 880, 232 Mass., 309, 122 N. E., 397;
Re Citizens Telephone Company, P. U. R., 1931C, 162;
Re Nashville R. & Light Co., P. U. R., 1929A, 664;
Department of Public Works ex rel. Friday Harbor v. Friday Harbor Light & P. Co., P. U. R., 1928E, 660;
Re Wisconsin Traction, Light, Heat & P. Co., P. U. R., 1919B, 224;
Re Interstate Light & P. Co., P. U. R., 1921E, 161;
Re Duluth Street R. Co., P. U. R., 1928B, 228;

Re Milwaukee Electric R. & Light Co., P. U. R., 1930C, 426;
Re Community Telephone Co., P. U. R., 1931C, 285.

The appellant apparently disregards also the fact that the past five years have represented a period of serious business depression of which this court has taken judicial notice. *Los Angeles Gas & Electric Corporation v. Railroad Commission of the State of California*, 289 U. S., 287, 77 L. Ed., 1180; *Atchison, T. & S. F. R. Co. v. United States*, (1932) 284 U. S., 248, 260, 262, 76 L. Ed., 273, 52 S. Ct., 146; *Dayton Power and Light Company v. Public Utilities Commission of Ohio*, 292 U. S., 290, 78 L. Ed., 1267. Other courts likewise have recognized this period of economic stress in the reduced rates which they have approved as non-confiscatory for public service corporations.

Smith v. Illinois Bell Telephone Company, 282 U. S., 133, 75 L. Ed., 255;
Illinois Bell Telephone Company v. Gilbert, 3 Fed. Supp., 595 (1933);
Re Yonkers Railroad, P. U. R., 1933B, 61 (1932) (New York Public Service Commission);
Re Kentucky-Tennessee L. & P. Company, P. U. R., 1932E, 386, 393 (Tenn.);
In re Chesapeake & Potomac Telephone Co., P. U. R., 1933E, 193 (P. U. C. of D. C.);
In re Northwestern Electric Company, P. U. R., 1933A, 493 (1932) (Oregon commission);
In re West Coast Telephone Company, P. U. R., 1933A, 487 (1932) (Washington Department of Public Works);
Re Lone Star Gas Company, P. U. R., 1933C, 1 (Oklahoma Commission);

City of Charleston v. Public Service Commission, P. U. R., 1931E, 74 (1931) (West Va. Supreme Court of Appeals);
Kankakee Water Co. v. Gilbert, P. U. R., 1933B, 145 (1933) (U. S. D. C. E. D. Illinois);
Ohio Associated Telephone Co. v. Frank W. Geiger, 3 Fed. Supp., 997, P. U. R., 1933E, 491 (1933).

The recent decisions of this court well illustrate the fact that the necessary and proper result of the application of the law is to reduce the fair rate of return for utilities in times of economic depression such as has prevailed throughout the life of the ordinance under discussion.

Los Angeles Gas and Electric Company v. Public Service Commission, 289 U. S., 287, 319 (1933);
Wabash Valley Electric Company v. Young, 287 U. S., 488-501 (1933);
Smith v. Illinois Bell Telephone Company, 282 U. S., 133, 75 L. Ed., 255 (1936);
Dayton Power and Light Company v. Public Utilities Commission of Ohio, 292 U. S., 290, 78 L. Ed., 1267 (1934);
Columbus Gas and Fuel Company v. Public Utilities Commission of Ohio, 292 U. S., 398, 78 L. Ed., 1327 (1934).

Certainly the value of the company's property which was made on the basis of prices existing as of March 31, 1928, would not be as great during any of the succeeding years of the ordinance period as it was during the ~~ordinance~~ period and yet in spite of all this the appellant insists upon a rate of return of 8% upon a valuation made at a price level existing in 1928 for a property that

is far in excess of the needs of the community that it serves. As a matter of fact, the company has never had any experience under the rates proposed by the commission for the reason that throughout this period of litigation they have continued to collect the higher rates formerly in effect. No consideration, therefore, has been given to a possible increase in the rate of return which might result from a reduction in the price of their commodity.

IV.

THE ANNUAL REPORTS FOR THE YEARS 1928-1931, INCLUSIVE, FILED WITH THE COMMISSION BY THE COMPANY PURSUANT TO THE PROVISIONS OF THE OHIO STATUTES AND PUT IN EVIDENCE AS COMMISSION EXHIBITS 1, 2, 3 AND 4 BY THE ORDER OF THE COMMISSION ON ITS OWN MOTION.

The company contends that the decision of the commission was based upon evidence not properly introduced in the record and argues that the commission resorted to the use of annual reports filed with the commission by the company pursuant to the provisions of the Ohio statutes. The record clearly discloses that these reports were put in evidence by the commission upon its own motion and that the company does not now urge that any of the information contained therein was prejudicial to it or incorrect. As a matter of fact, when the company filed its application for a rehearing before the commis-

sion its only objection to the introduction of these reports was that the report for 1932 had not been included. It did not object to the contents of the reports or allege in what manner it was prejudiced by their being placed in the record. Not having raised this question in its application for a rehearing, under the Ohio statutes, Section 543, General Code, it was not entitled to raise it in the Supreme Court of Ohio. It is perfectly obvious, however, that the company was treated entirely fairly in the use of these annual reports and the principle of due process of law was not violated by the commission's including them in the record.

Snyder v. Massachusetts, 291 U. S., 97, 78 L. Ed., 674.

V.

VARIOUS OTHER CONTENTIONS ADVANCED BY APPELLANT.

The appellant contends that the court erred in not finding that the validity of the rate order must be determined by its effect on net earnings from year to year and that the rate order and the order to refund were invalid because this requirement had not been complied with. When it is considered that this ordinance was a rate ordinance covering a period of more than five years and that more than four years of the period had expired when the commission rendered its opinion the fallacy of the company's contention in this regard becomes apparent.

The contention that the state Supreme Court erred in not holding that the rate order is invalid because the commission refused to grant the company a rehearing.

There was no basis upon which the company should have been granted a rehearing. To have further delayed the case for the purpose of granting a rehearing would have been highly improper.

The contention that the state Supreme Court did not make that independent judicial review of the law and the facts which due process and equal protection of the laws require.

This contention seems to be a part of the recognized formula followed by all utilities when an appeal is taken to this court.

> *Columbus Gas & Fuel Company v. Public Utilities Commission of Ohio,* 292 U. S., 398, 54 S. Ct., 703, 78 L. Ed., 1327;
> *Dayton Power and Light Company v. Public Utilities Commission of Ohio,* 292 U. S., 290, 78 L. Ed., 1267.

The decision of this court in the Columbus Gas case, supra (1934), holding that the Supreme Court of the United States will presume in reviewing a decision of a state court that the testimony in the record was given due consideration effectively disposes of this contention of the appellant.

ARGUMENT.

I.

THE EFFECT OF THE COMMISSION'S ORDER, AFFIRMED BY THE STATE COURT, ON THE EARNINGS OF THE COMPANY.

The rates prescribed by the commission for gas service furnished by the company to the consumers of Lima upon the basis of the actual gross income collected by the company during the four years of the ordinance period for which the figures were available would have produced an average minimum return of 5.75% on a valuation made at 1928 prices for a property having a capacity far in excess of the needs of the community.

The company discusses at great length certain mathematical errors made by the commission in its original order. These errors were promptly corrected by the commission and its counsel prepared and included a corrected table in the supplemental brief filed in behalf of the commission in the state court (see Lima Ex. A, p. 186A, appellant's brief and Lima Exhibit B, p. 187A, appellant's brief, Tables I and II, pages — ~~infra~~) 10 + 12 Supra

These tables disclosed that the average gross revenues from gas service in Lima under the rates prescribed by the commission would have been not less than $416,225 and that the total average expenses of the company allowed by the commission were $306,811.00 leaving to

the company as average net income for the period the sum of $109,414.00 and that this amount would result in an average rate return to the company of 5.75% upon a valuation of $1,901,696 as of March 31, 1928.

These are the facts and a discussion of alleged errors no matter how voluminous will not change them.

The appellant recognizes the correctness of the average revenue that would have been produced under the commission's rates at p. 130 of its brief (Appellant's brief p. 130) in the following language:

> "The record shows that the rates ordered in effect by the commission would produce an average revenue of approximately $416,000.00 a year during the first four years of the ordinance period. (Appendix A, pp. 179A, 183A, infra.)"

The appellant contends, however, that its true operating expenses averaged $384,000 a year (Appellant's brief, p. 130). The average operating expenses as allowed by the commission and corrected as to all mathematical errors were $306,811.00, the difference being $77,384.00.

The question presented therefore resolves itself into whether the reduction by the commission approved by the state court of operating expenses as contended for by the company were justifiable and whether a minimum rate of return of 5.75% for the period involved was confiscatory.

In considering these questions certain facts must be kept in mind. It must be remembered that the capacity of the company's property far exceeds the needs of the

community that it serves. (R., 201, 204, 205, 206, 248, 249, 265, 292, 301, 427, 428.) That the valuation of that property upon which the rate of return was computed was made at a price level existing as of March 31, 1928 (R., 83), and that the real value of the property during the succeeding years of the ordinance period has been considerably less than the value used as the rate base (R., 478, 511, 512). That the period involved represents a period of profound economic changes and depression. That the gas furnished to Lima is a mixed gas inferior in quality to natural gas (R., 195, 196). That the price of this gas is exceedingly high (R., 90, 273). That the company throughout the period has met its fixed charges, paid dividends on its stock and, according to the testimony of its own witnesses, maintained its property in 100% condition (R., 131, 167, 168) and, finally, that the company does not know how much greater its income might have been under the reduced rates fixed by the commission for it has continued to collect throughout this litigation the high rates formerly charged by it and the computation of gross revenues under the commission rates was arrived at upon the basis of sales under the company's rates. If the commission rates had been in effect increased sales certainly would have resulted.

With these factors in mind we approach the problems presented of (a) were the reduction in the company's operating expenses as made by the commission and approved by the state court justifiable and (b) was the rate of return allowed by the commission and approved by the state court confiscatory.

II.

APPELLANT'S OPERATING EXPENSES.

The importance of determining the proper amount to be allowed as operating expenses has been recognized by this court in the recent case of *Lindheimer v. Illinois Bell Telephone Company*, 292 U. S., 151, 54 S. Ct., 658, 78 L. Ed., 1182 (1934) where it held in par. 3 of the syllabus:

> "3. Charges to operating expenses may be as important as valuations of property in determining whether a public service commission's order establishing rates for telephone service is confiscatory."

Discussing this topic in the opinion, Mr. Chief Justice Hughes speaking for the court says: (p. 164.)

> "Operating expenses. In determining the effect of these reductions, and what amounts would still be available to the company for net return, we come to the questions raised by the company's charges to operating expenses. Charges to operating expenses may be as important as valuations of property. Thus, excessive charges of $1,500,000 to operating expenses would be the equivalent of 6% on $25,000,000 in a rate base. In this instance, against the reductions which the rate in suit would have effected, are the considerable sums which would be added to the amounts available for return by the adjustments in operating expense made by the District Court * * *".

The difference in the annual operating expenses as claimed by appellant and as allowed by appellee is $77,384.00.

The items comprising this difference are set forth at p. 10., supra. Of the total difference $28,021.40 results from a reduction in the retirement allowance, that is, a reduction in the annual allowance for depreciation made by appellee under the amount claimed by appellant.

$22,935.97 results from the refusal of the appellee to allow the amortization claimed by appellant on a 44 mile transmission line used for the purpose of transporting natural gas from the source of supply to the city of Lima and which admittedly is used and useful in the conduct of the company's business and will continue so for an indefinite period of time. The expense of maintaining this transmission line is borne by the Ohio Fuel Gas Company under the terms of its contract with appellant covering the sale of natural gas and, in addition, the value of the line allocable to Lima is included in the base fixed by the appellee as the value of the depreciable property on which the annual depreciation charge was allowed.

These two items total $50,957.37 annually or all but $26,426.56 of the difference in the amount claimed by the appellant and the amount allowed by appellee for operating expenses.

The appellee also reduced the expense of gas produced and purchased as claimed by appellant to the extent of $3,786.83; distribution expense to the extent of $6,194.11; commercial expense to the extent of $1,085.25; new business expense to the extent of $7,110.20, and general and miscellaneous expense to the extent of $8,322.80.

The appellee increased the expense as claimed by the company in six other items. These increases, however, were small and insignificant so far as the consideration of this case is concerned.

1. Gas Produced and Purchased (Cost of gas sold).

An allowance of 7% for losses through unaccounted for gas is ample and sufficient based upon the knowledge and experience of an administrative commission informed as to such matters.

The company claims that for the four-year period from 1928 to 1931, both inclusive, which was the period used by the commission on the basis of the figures available to it at the time its opinion was prepared, the average cost of gas produced and purchased for each year was $150,361.75. The commission allowed for this same period the sum of $146,574.92, making a difference of $3786.83.

The difference in this item between the amount contended for by the company and the amount allowed by the commission rests primarily in the amount allowed by the commission for unaccounted for gas, the company claiming a 9% allowance for unaccounted for gas and the commission allowing 7% to cover this item. It should be borne in mind that the claim of the company is predicated upon the flat assertion made in the record to the effect that 9% of their gas was unaccounted for. Where it went was not explained. The commission felt, and so found, that this amount was excessive under all the cir-

cumstances and that 7% was an ample allowance for unaccounted for gas and in passing upon this particular item in its opinion said: (Commission Opinion R., p. 95.)

> "An estimate of leakage in the Lima case, based upon the amount purchased and manufactured as compared to the amount distributed, would indicate an average leakage of 9%. This, we believe to be excessive and with proper care of the system could be reduced to 7% which we allow. This reduction of 2% in leakage is reflected in a corresponding reduction in the cost of gas sold which appears in the operating statistics presented below."

Certainly, the commission in the light of its knowledge and information as an administrative commission does not have to accept the flat assertion of the company as to the amount of unaccounted for gas that may be included in its operating expenses.

In the case of the Columbus Gas Company (in the matter of the complaint and appeal of the Columbus Gas & Fuel Company from an ordinance of the city of Columbus, Ohio, to fix the price that may be charged for natural gas in the city of Columbus, Ohio, No. 5935) the company claimed only 6½% for unaccounted for gas and the commission allowed but 5% for this item. This allowance was approved by the Supreme Court of Ohio, *Columbus Gas & Fuel Company* v. *Public Utilities Commission of Ohio,* 127 O. S., 109, 187 N. E., 7, and the findings of that court in that regard were not disturbed when that case was presented to this court. *Columbus Gas & Fuel Company* v. *Public Utilities Commission of Ohio,* 292 U. S., 398, 54 S. Ct., 703, 78 L. Ed., 1327.

In the case of the East Ohio Gas Company (in the matter of the complaint and appeal of the East Ohio Gas Company No. 7130 before The Public Utilities Commission of Ohio) decided by the commission on the nineteenth day of September, 1934, the company voluntarily made the statement that leakage in the East Ohio Gas system amounted to only 3½%. Under the circumstances the commission did not abuse its discretion when it reduced the amount claimed for unaccounted for gas from 9% to 7%.

2. Distribution Expense.

Where the company's total distribution expense is accepted without question by the commission and allocated on a per customer basis to the various communities served by the company, a fair and reasonable distribution expense has been allowed to the company.

The company claims as an average for the four-year period from 1928 to 1931, inclusive, the sum of $40,622.11 for distribution expense. The commission allowed for this same period for distribution expense the sum of $34,428, or $6194.11 less per year than was contended for by the company.

Included in distribution expense are such items as superintending distribution of gas, work on customers' premises in connection with service, changing meters to measure gas sold, maintenance of local distributing mains, service and meters. The company relied upon Company Exhibit No. 104 to substantiate their allocation

which was based largely on a gas consumption basis. The commission took the view that a per customer basis was the only fair way to allocate distribution expense and also commercial expense and general and miscellaneous expense. It, therefore, took the annual reports of the company from which it developed the following:

Number of Customers (from Annual Reports.)
Entire Company.

Year	*Average*	*Lima*
1928	15,209	10,045
1929	15,916	10,139
1930	15,912	9,832
1931	16,183	9,152

Dividing the total amount of distribution expense shown in the annual report for each year by the number of customers in the entire system produced a per customer cost for this item which it multiplied by the number of Lima customers, as shown in the above table. It will be recognized that it is necessary to allocate distribution expense to Lima and it should be equally well recognized that the use of a per customer method of allocation is a fair and reasonable one and, as a matter of fact, in so far as Lima is concerned, that particular method of allocation should result in a more favorable figure to the company for the reason that the per customer cost should be less in a city of the size of Lima than in smaller communities. However, the company contends that this method of allocation results in a higher per capita charge to Lima customers and to support that theory they urge that there is more paving to

be cut in making main repairs, higher wages to be paid and higher percentage of customer change in Lima than in other communities served by this company. These facts, however, are not shown by any testimony in the record. On the contrary, the company's method tends to unfairly raise the per customer distribution expense in the city of Lima as this allocation for such expense is based on volume of gas consumed. Common sense would seem to indicate that where the company's total distribution expense is accepted without question but allocated to various communities on a per customer basis the company should not be heard to complain.

The company cites the cases of *Northern Pacific Railway Company v. North Dakota,* 236 U. S., 585, and *Banton v. Belt Line Railway,* 268 U. S., 413, to support their contention that the commission erred in using the per customer method of allocation, in so far as distribution expenses are concerned. An examination of those cases, however, discloses that they require classification only of each kind of expense. The commission found by its method that the average distribution expense per customer for each of the four years involved was $3.52. The commission's judgment is best expressed in its own language which is as follows: (Commission's Opinion, R., 93.)

> "These expenses, in the opinion of the commission, represent items which should be distributed against all the consumers of the entire system of the West Ohio Gas Company. It is felt that consumers in Lima should bear no higher portion of these expenses than other consumers."

The Supreme Court of Ohio in passing upon this question makes the following statement: (*West Ohio Gas Company v. Public Utilities Commission of Ohio,* 128 O. S., 301, R., 27.)

> "We see nothing unfair in this method, and on readjustments we fail to see where the gas company was treated unfairly."

3. Commercial Expense.

Where the company's total commercial expense is accepted without question by the commission and allocated to the various communities served by the company on a per customer basis, a fair and reasonable commercial expense has been allowed to the company.

The commercial expense contended for by the company on an annual average basis for the years 1928 to 1931, inclusive, was $20,804.25 for each year. The amount allowed by the commission for this item was $19,719 for each year, and the difference is $1085.25.

The items included in this expense are such things as cost of reading meters, keeping customers' accounts, and sending out and collecting bills.

The commission in computing the allowance for commercial expense again took the exact amount shown by the company in its annual reports for each of the four years examined, allocated on a per customer basis. The results of these are shown for each of the years in the table of expenses. The company contends that a higher per capita cost is incurred in the city of Lima for rendering the services hereinbefore described than is in-

curred over the whole system. We believe it is perfectly apparent that in a large community the costs which are here involved should be less per customer than in a small community and we believe it should be recognized that the cost of meter reading in one town is not much greater than the cost of reading a meter in another town and, if anything, it should be less in larger towns where the houses are closely built up than in less populated sections. It should also be obvious that it doesn't cost any more to keep a customer's account in one city than in another and it should not cost any more to send out and keep bills in one city than in another. When these perfectly apparent facts are considered the presumption at least arises that the company is attempting to allocate a higher than reasonable cost to a city wherein is involved a rate controversy than in the other communities where no such rate litigation is going forward.

And the fallacy of the company's entire argument is contained in the last sentence of its very brief discussion of this topic at page 96 of its brief (Appellant's Brief, p. 96) wherein the following statement appears:

> "There is no place in these charges for the use of company averages *even if properly arrived at* and the reduction made by the commission in this item of expense must be corrected. (Italics ours.)

This contention of the company is not supported by the recent decision of this court in the case of *Los Angeles Gas and Electric Corporation v. Railroad Commission of the State of California,* 289 U. S., 287, 77 L. Ed.,

1180, wherein this court held at paragraph 1 of the syllabus:

> "In a suit involving the validity of rates fixed by a state public service commission, the Supreme Court of the United States does not sit as a board of revision, but to enforce constitutional rights, and is not concerned either with the method used in reaching the determination except as it may have a definite bearing on the validity of the result reached, or in the determination itself, so long as constitutional limitations are not transgressed."

4. New Business Expense.

An administrative commmission is not bound to include in the operating expenses claimed by a public utility an arbitrary amount which the utility may have expended for the purpose of securing new business where the circumstances do not warrant the expenditure of the amount claimed and the results—in so far as the obtaining of new business is concerned, are unsatisfactory.

It is the contention of the company that there should have been allowed to it in its operating expenses the sum of $12,110.20 annually for the purpose of obtaining new business. To support that contention it produced as an exhibit Company Exhibit 104 (11), (R., 540) and insisted that the commission was bound to accept the amount shown in that exhibit, without regard to whether or not the commission felt the expenses were justifiable, as the amount which must be allowed for this item. It is perhaps of more than passing significance that the new business expense shown in this exhibit for the year

1927 was $7445.34 as compared to the average now claimed of $12,110.20 for the period during which this rate litigation has been in process. The commission found that the amount claimed by the company was in excess of what it should have expended and in excess of the amount that, in the opinion of the commission, it was reasonable to expend for this particular purpose, and reached a conclusion that an expenditure of $5000 per year was adequate. The testimony produced by the company in an attempt to justify the expenditure for this item is found in the record at pages 339-344, 359-360, 368. This testimony discloses that the company has continually lost business during the period involved (R., 59) and that the amount of gas sold has likewise diminished. (R., 360.) Testimony also was introduced by the witness for the city to the effect that the expenditure claimed by the company was not warranted in view of the results obtained. (R., 453.)

As a matter of fact, the commission tried with the utmost diligence to discover from the company's witness just what services were included in this cost for obtaining new business without any particular degree of success. This court will be able to obtain a fair idea of the type of testimony which was introduced by the company to support its allegations for an allowance in excess of $1000 per month for new business expense from the following statement by the company's witness: (R., 343.)

> "Commissioner Geiger: You mean that you have got to demonstrate to a person how to light a natural gas burner?

"The Witness: In some instances, that is far fetched, but in some instances you do find people that are so — dumb they can't light a gas light but that isn't general."

The commission in passing upon this matter said: (Commission's opinion, R., 95-96.)

"This item has been reduced to $5000. The company's figures indicate that, over the four years in question, the average new business expense was $12,045.00, varying from $10,412.00 in 1928 to a maximum of $13,485.00 in 1930.

"The testimony in this case has not convinced the commission that the expenditures under this head should be allowed as a burden upon the present consumers, in the full amount that may have been spent, by the company for the purpose of expanding its business. It is, of course, conceivable that the more new business that is gained for the company, the less will be the burden upon the individual consumers in the form of rates. However, this has not been the result from experience. There has been no appreciable expansion of business, due, to some extent, to the depression, and as we believe, also to the high price charged for the gas sought to be sold. We are willing to allow this item, in what we deem an ample sum, in the flat amount of $5000.00 per year, which is reflected in the table below."

The whole contention of the company relative to the amount that must be allowed for this item is based upon the theory that since this is the amount that has been expended the commission must accept that amount and include it in the company's operating expenses regardless of whether or not the commission in the exercise of its judgment and discretion feels that the amount is prop-

erly expended or is a reasonable expense for the item in question and that unless the commission can show by positive evidence that the expenditure was made fraudulently or in bad faith the amount must be allowed in its entirety as contended for by the company. If such a rule is applicable and if the commission must accept without question and without regard to the circumstances all amounts expended by the company in attempting to develop new business it will obviously be unable to fix reasonable rates because it will never know from year to year how much more expense the company contemplates in that direction. It is apparent from the present case that the company has increased the amounts for this item since the inception of this rate proceeding. On the basis of this argument they might have spent as much as $100,000.00 a year for new business and unless and until the commission could show that they had acted fraudulently or in bad faith they would insist that such an expenditure was justifiable. The most serious problem that this company has in securing new business arises out of the fact that the rate for an inferior grade of gas is excessively high and the following testimony given by the company's witness fully illustrates that fact: (R., p. 389.)

"Q. You are now spending, Mr. Pringle, approximately ten thousand dollars a year trying to secure new business? A. Yes, sir.

Q. And the hardest job that department has is to sell and convince people that they can afford to pay that price? A. I assume so.

Q. And your new business department could do a

great deal more business if your gas were cheaper, couldn't it, by any rule of business economics that you know anything about? A. I assume so.

Q. You do not take anything like that into consideration in your figures? A. No, sir."

5. General and Miscellaneous Expense.

Where the company's general and miscellaneous expense, with the exception of rate case expense, is accepted by the commission and allocated to the various communities served by the company on a per customer basis, a fair and reasonable general and miscellaneous expense has been allowed to the company and the company is not entitled to insist upon the inclusion of rate case expense for the purpose of establishing confiscation.

It is the contention of the company that its annual average expenditure for the item of general and miscellaneous expense for the four-year period involved was $47,557.80. The commission average expense for the same period was $39,235.00, making a difference of $8,322.80 per year in the amount contended for by the company and the amount allowed by the commission. A substantial portion of the difference consists in the amount which the company alleges should have been allowed it for rate case expense and the remaining difference arises by virtue of the use on the part of the commission of the per customer method of allocation rather than the consumption method of allocation insisted upon by the company.

At page 108 of its brief (Appellant's Brief, p. 108) the appellant makes the following statement:

> "General and miscellaneous expenses are incurred principally for the company as a whole. Under this account are included the expenses of administration and other costs that have to do with the general management of the company (R., 541, 545-8.)"

In view of this frank admission of the company it is difficult for us to understand why they now insist that the per customer method of allocation of general and miscellaneous expense is untenable when it is recognized that these expenses are incurred in the administration of the affairs of the company. We feel the commission's method of allocation on a per customer basis will be recognized as a perfectly sound and logical one. The company attempts to establish the fact that certain of these direct expenses are assessed against the city of Lima and not against the operations of the company (Company Exhibit 104, 16, R., 544.) The largest part of these so-called direct costs which they attempt to assess against the city of Lima consist of rate case expense and charitable contributions and donations. The total is negligible and would not affect the result of this case in any degree.

The only explanation that appears in the record relating to Schedule 16, Exhibit 104, supra, is found at page 349 where the witness stated that these amounts were charged directly on the books to Lima.

The company recognizes that it is necessary to allocate general and miscellaneous expenses to the various com-

munities involved and insists that this should be done upon the basis of gross revenues from gas sales. The only purpose, of course, in so doing is to show a higher operating cost for the city of Lima. It should be perfectly apparent that the per customer basis of allocation used by the commission is sound and the commission certainly did not commit an administrative error with which this court is concerned in choosing that method of allocation rather than the method insisted upon by the company.

As a matter of fact, the company fared rather well at the hands of the commission with respect to general and miscellaneous expense for the commission allowed the entire amount claimed by the company with the exception of rate case expense which will be discussed post and included in this item of general and miscellaneous expense allowances for contributions for sustaining chambers of commerce, annual local charitable contributions, occasional civic and charitable special funds, other donations, chamber of commerce membership dues, national and state utility association dues, other association expenses, traveling expenses associations and expenses for services rendered by the Midland Company, the owner of the common stock of the West Ohio Gas Company. (R., 541.) The donations and dues hereinbefore referred to constituted a rather substantial amount each year and the payment for Midland Company services averaged approximately $4450 each year.

It should be readily recognized that the inclusion in

this item of expense of contributions for charitable purposes, donations and the expense of memberships in chamber of commerces and other associations has no proper place in the operating expenses of any public utility. There certainly was no evidence introduced to show that any consideration or benefit was actually received by the company or that the donations were necessary to provide proper gas service at reasonable rates or that they reduced or eliminated expenditures that would otherwise be necessary or that the gas consumers directly or indirectly benefited to any degree by virtue of the gifts, in a way capable of being measured in money. To call such contributions an operating expense is as contrary to common sense as it is detrimental to proper regulation of a public utility. The causes to which these contributions were made were no doubt worthy and donations, especially those which look toward the alleviation of human suffering, are to be commended. However, one is somewhat shocked at the generosity of the utility and its commendable spirit of giving to suffering humanity when the company attempts to recoup its contributions from the consumers through charges to operating expense, which are in turn, assessed directly against the rate payers in a collection of charges high enough to support a net return at a given figure above the amount of the donations or contributions.

Under the uniform classification of accounts for natural gas utilities prescribed by the Public Utilities Commission of Ohio, to which this company must conform, donations are a debit to surplus, and not an item of op-

erating expense. Within the past two years the question whether donations should be charged to surplus or to operation has been thoroughly explored and finally determined by the Interstate Commerce Commission and the New York Public Service Commission, and both these bodies have reached the same conclusion and that is that such items are not properly included in operating expenses. *Re New York Telephone Company,* P. U. R. 1932D, 20 (1932) (New York Public Service Commission); re *New York Telephone Company,* P. U. R. 1933C, 409 (Interstate Commerce Commission), and in rate making proceedings the rule adopted by the overwhelming and virtually unbroken weight of authority is that donations made by utilities are not a charge to operation, cannot be charged to the consumer, and must be borne by the stockholder.

Re *Lone Star Gas Company,* P. U. R. 1932C, 1 (Oklahoma);

Re *Reservations, Contributions and Donations, Interest During Construction and Property Not Used in Operations* (D. C.) P. U. R. 1930D, 113, 114;

Herring v. Clarks Ferry Bridge Company (Pennsylvania) P. U. R. 1926D, 514, 529;

Idaho Power Company v. Thompson, 19 Fed. (2d) 547, P. U. R. 1927D, 388 (Federal);

Re *Citizens Independent Telephone Company* (Indiana) (1929) P. U. R. 1930A, 431;

Rock Port v. Clifton (Missouri) P. U. R. 1927E, 470;

Re *Crystal City Gas Company* (New York) P. U. R. 1925E, 91;

Re *Southern California Edison Company,* P. U. R. 1924C, 1 (California);

Municipal Gas Company v. Wichita Falls (Texas) P. U. R. 1924B, 410;
Re *Idaho Power Company* (Idaho) P. U. R. 1924C, 731;
Railroad Commissioners v. Hughes Electric Company (N. D.) P. U. R. 1925A, 18.

It should, therefore, be apparent that the company has been allowed to include in its operating expenses for each year considerable sums which should not be properly included in operating expenses for rate-making purposes. There was also included in this item, and allowed by the commission, compensation paid to the Midland Company, the parent company of the West Ohio Gas Company, approximating some $4450 a year for the four-year period involved. This compensation was presumably for services rendered to the West Ohio Gas Company by the Midland Company but the court will search the record in vain in an effort to obtain very much light upon the subject of just what these services were and the basis of their justification. (R., 413, et seq, 350, et seq.)

So that as a matter of fact a considerable amount was allowed to the company without question by the commission under the heading of general and miscellaneous expenses which should not have been allowed.

Rate Case Expense.

In addition to the small difference existing between the company and the commission for the item of general and miscellaneous expense by virtue of the method of allocation used by the commission instead of the use of the

method contended for by the company there is a difference in the amount of approximately $5790 per year for rate case expense claimed by the company and amortized over the period of six years. The total amount claimed by the company for this item being $30,607.69. However proper it may have been for the commission to allow this amount in its entirety or in part it cannot properly be raised in this court for the purpose of establishing confiscation. In *New York & Queens Gas Company v. Newton*, 269 Fed., 277, at paragraph 5 of the syllabus was found the following statement:

> "5. Gas—14(1) Expenses of litigation should be excluded in ascertaining whether rate was confiscatory. In a suit to enjoin the enforcement of laws, New York, 1906, c. 125, on the ground the maximum rate of $1.00 was confiscatory, expenses of the injunction suit should be excluded."

The court in its opinion on this subject holding as follows:

> "5 (b) Expenses of litigation—These were also excluded by the master, but were allowed by the court in the Consolidated Gas case. I should follow the decision on this point in the Consolidated Gas case, were it not that I am firm in the conviction that, while this item may properly be considered in fixing a rate, it is not to be included in determining whether the rate is confiscatory. I agree with the master both in this conclusion and his reasons therefor."

And in the case of *Reno Power, Light and Water Company v. Public Service Commission,* 298 Fed., 790, at paragraph 15 of the syllabus is the statement:

> "15. [Gas—14 (1)] Expense hearings not considered in fixing rates. Expense of rate hearings are deemed abnormal, and are not considered in determining whether rates are confiscatory."

In its opinion the court on this subject says:

> "15. $8594.95 is charged as the expense of rate hearings. As such litigation is of rare occurrence, if allowed at all, it should be spread over a series of years; but even this treatment has not been approved by the courts. Such items are deemed to be abnormal, and are not entitled to consideration in determining whether rates are confiscatory."

In the case of the *Columbus Gas & Fuel Company v. City of Columbus,* 17 Fed. (2nd), 630, which was decided by the federal court for the southern district of Ohio, paragraph 12 of the syllabus provides as follows:

> "12. Gas company held not entitled to allowance as part of rate base, of expenses for legal services and for advertising in newspapers in preparation and contemplation of rate base litigation."

At page 640 of the opinion the court said on this subject:

> "The court is able to find no decision, however, where the court has held directly that the legal expense of the utility arising in preparation and prosecution of its claim of unconstitutionality is allowable to directly produce or influence that unconstitutionality. Such would appeal to the court to be unreasonable as well as inequitable."

For a further discussion of this point see *Public Utility Reports Digest,* Volume 2, p. 1553.

Upon the basis of the foregoing authorities which seem to be uniformly recognized, it is, we believe, apparent that the cost of rate case expense which the company had included in general and miscellaneous expenses allocated over a period of five years is not a proper charge to be considered by the court in determining whether or not the rates fixed by the commission in this case are or are not confiscatory.

The commission has made ample allowance for the item of general and miscellaneous expenses. As a matter of fact, when it is considered that it has allowed without question many items which should properly not be included it becomes apparent that its allowance is even generous.

6. State Excise Tax.

The company complains of the fact that the commission did not take into consideration the enactment of the Ohio Legislature in 1932 increasing the excise tax on public utilities from 1.35% to 2.35% of gross revenue. This act became effective April 5, 1932.

The same question was presented to the Supreme Court of Ohio in the case of the *Columbus Gas & Fuel Company v. Public Utilities Commission of Ohio,* 127 O. S., 109. This particular tax was purely an emergency tax which was passed for a period of one year only. It was only in force and effect during the last year of the ordinance

which is here under discussion. While we recognize that a great weight of authority sustains the right of utilities to include in operating expenses all normal taxes, we do not believe such a rule was intended to include a purely emergency tax such as this one obviously was intended to be and it is our belief that the very purpose of this legislative enactment was to cause public utilities to carry at least a small portion of the greatly increased tax load which is now facing every individual. As a matter of fact, there have been times when we have wondered as to the wisdom of the general principle of including all taxes in operating expenses. All normal taxes, including federal income tax, real and personal property taxes, excise taxes and the Public Utilities Commission tax, are included in the operating expenses of each company and recognized and allowed by the commission. In other words, the company really acts only as an agent in collecting these taxes for the various governmental agencies from the consumers themselves through the medium of rates. Regardless of the amount of such taxes rates must be fixed to allow a fair return after their payment in full. The result of this method means that the companies themselves have no real tax burden. In the instant case very little damage, if any, was done to the utility by the failure of the commission to include for the year 1932 the amount contended by the company to have been paid for excise tax which became effective on April 5 of that year, which was the last year of the ordinance period.

7. Retirement Reserve Allowance.

The annual depreciation allowed by appellee is ample and sufficient and exceeds the actual experience of the company for this item.

The appellant contends that the judgment of the court below in affirming the order of the appellee fixing the annual depreciation allowed by appellant was erroneous.

To support this contention appellant recites that the evidence showed that $53,639.00 a year is necessary for appellant's annual depreciation requirements. This evidence is contained in an exhibit introduced by the appellant. (R., 530.) Presumably this evidence is supposed to represent 3% of the total depreciable property. As a matter of fact this was simply another attempt to show a higher operating cost than the appellant actually sustained.

Peculiarly enough the company does not insist strenuously upon the allowance which they claim is absolutely necessary in the amount of $52,539.40 for annual depreciation but devote most of their discussion of this topic to insisting upon an allowance of $35,579.32 (1.5% depreciable property) on the basis of the testimony of the city's witness Allensworth. For the moment they apparently overlook the fact that this same witness has stated that the actual experience of the company's measured in terms of the commission's finding as to reproduction cost was 9/10 of 1% per year with respect to annual depreciation. The company in commenting upon

witness Allensworth's testimony (Appellant's brief, p. 121) says:

> "The principle followed by the city witness on this phase of the case was fundamentally sound."

This sudden tribute to the city engineer is rather startling in view of the company's repeated assertions found throughout the record as to the witness' general incompetency, and its insistence throughout the case that he was not qualified to testify at all as a witness. (R., 473-474.)

The company insisted that it should be allowed 3% of the value of the depreciable property for this item. Witness Allensworth stated that 1.5% of the commission reproduction cost would constitute a proper annual charge for depreciation. (R., 442.)

The record discloses (R., 443) that the actual experience of the company taken from its books indicates that the experience of the company in meeting the expense of depreciation over the 7 year period from 1925 to 1931 was at the rate of 59/100 of 1% of the company's book value of the property. This same experience, measured in terms of the commission's finding as to reproduction cost, was 9/10 of 1% per year. The commission allowed for this item an annual depreciation charge of 1.4% on the depreciable property valued at $1,751,288.60 as of

March 31, 1928. The commission stating with respect to its allowance as follows: (R., 93, 94)

"Depreciation

"The company claims that it should be permitted to set up for annual depreciation charges the sum of $53,639.00.

"The city claims that the sum of $35,579.32 should be allowed as an annual depreciation charge, this sum being 1½ per cent. per annum of the reproduction value of the depreciable property used and useful in Lima.

"Neither amount is satisfactory. In the record of this case, it is said (pages 1169 et seq.) that the actual experience of the company relative to depreciation for the seven-year period 1925 to 1931, was at the rate of 95/100 of 1 per cent. per year of the company's book value of its property and, further, that if the company's experience in regard to book value is applied to this commission's finding as to reproduction cost, 9/10 of 1 per cent. per year would have been set up for depreciation purposes.

"These statements are not refuted by the company.

"Nine-tenths of 1 per cent of the reproduction value of the depreciable property as of March 31, 1928, would be $20,169.08. This would be the amount allowed as an annual depreciation charge under the plan discussed above.

"The commission feels, however, that the annual rate of depreciation should be based upon the then present value of the depreciable property.

"Consequently, there has been allowed an annual depreciation charge amounting to 1.4 per cent. on $1,751,286.60 of property as of March 31, 1928, resulting in an annual depreciation charge of $24,518.04. In view of the evidence in the record of this case relative to depreciation, the amount set up and

allowed herein as an annual depreciation charge is, in our opinion, ample.

"This becomes particularly true when it is realized that the company's maintenance policy undoubtedly provides for many items that would ordinarily be taken care of by depreciation reserve."

The Supreme Court of Ohio affirmed the action of the commission as to this allowance in the following language: *West Ohio Gas Company v. Public Utilities Commission of Ohio,* 128 O. S., 301. (R., 26.)

"The gas company excepts to the allowance by the commission of 1.4 per cent. of the depreciable property as a reasonable amount for depreciation reserve. The gas company contends for 3 per cent.

"We have little trouble with this proposition. This finding was made from seven years experience, 1925 to 1931, inclusive, as shown by the gas company's book value. The fact is that the commission was more liberal in this regard than the book value warranted."

The action of the commission affirmed by the state court is amply supported by additional evidence found in the record for it is disclosed that the company in its operation as a whole had accumulated $327,766.87 as an unexpended balance in depreciation reserve and amortization as of December 31, 1931, (R., 444, 786.) while maintaining its property in 100% condition.

The testimony of the company's witnesses is pertinent in this connection. Company Witness Curtin, the president of the company, testified that the company's plant was 100% efficient and that the physical condition was 100% (R., 167) and that it would not be possible "to

expend economically and sensibly as much as $200,000.00" to make the Lima property better than it now is. (R., 167, 168.) Company Witness Pringle, the company's comptroller, was equally enthusiastic as to the plant's perfect condition, he also being of the opinion that it was 100% efficient. (R., 131.)

When it is considered that the plant, according to testimony of its own witnesses, has been maintained in a 100% condition and is today physically perfect and that it would be impossible to expend as much as $200,000 on the property to improve it we can conceive of no justification for the company's contention that an annual depreciation allowance of 3% is necessary and particularly is this true when the evidence discloses that the actual experience of the company over a seven year period in the meeting of the expense of depreciation has been less than 1% per year, on the basis of which allowance they have accumulated an unexpended balance in depreciation reserve and amortization reserve as of December 31, 1931 in the amount of $327,766.87. (R., 444, 786.)

The decision of this court in *Smith v. Illinois Bell Telephone Company*, 282 U. S., 133; 75 L. Ed., 255, is of interest in this connection. Paragraph 10 of the syllabus provides:

> "10. The allowance for depreciation entering into the ascertainment of the rate base of a public utility may be based on past experience, and should not be continued if shown by past experience to be excessive."

In the recent decision of this court in the case of *Dayton Power and Light Company v. Public Utilities Commission of Ohio*, 292 U. S., 290, 78 L. Ed., 1267, this court approved the action of the Ohio commission in reducing the amount claimed by the company for reserve for depreciation from 4% of depreciable property to 2% of the depreciable property on the basis of the actual experience of the company, and in the case of the *Columbus Gas & Fuel Company v. Public Utilities Commission of Ohio*, 292 U. S., 398, 78 L. Ed., 1327, this court held in discussing the allowance made by the commission for the annual depreciation of the company's property, as follows: (p. 414, 1336)

> "The commission determined that in view of the large reserve and the good condition of the plant, the allowance asked for by the company ($174,880.24) was too high, and that $68,196.00 was adequate.
>
> "This is slightly less, it is true, than the amount ($88,695.03) suggested by a witness for the city, but the commission was at liberty to form its own judgment."

As a matter of fact, the allowance of the commission for annual depreciation, consisting of 1.4% of the depreciable property valued at $1,751,288.60 as of March 31, 1928 was not only adequate for this particular item but, in view of the evidence in the record, was exceedingly generous.

8. The Question of Amortizing the Forty-four Mile Transmission Line.

There is not the slightest justification for the inclusion in operating expenses of $22,935.97 a year for the purpose of amortizing a transmission line used to convey natural gas into the city of Lima when it is admitted that the transmission line is used and useful in the company's business and will continue so for an indefinite period in the future.

The fallacy of such a contention becomes even more apparent when it is recognized that the transmission line was included in the valuation of the company's property and its value allocable to Lima was included in the value of the depreciable property on which the annual depreciation charge is allowed even though the expense of maintaining the line is borne by the producing company selling gas to the West Ohio Gas Company.

The company claims $22,135.97 annually as a special amortization allowance for the transmission line extending east from Lima some forty-four miles and used for the purpose of transporting natural gas to the city of Lima. The commission refused the allowance for this item requested by the company.

The sole basis for the company's claim in this connection is predicated upon the fact that in 1924 the then commission had authorized such amortization.

The fact is that such authorization was obtained at a time when the then commission was swayed by the representations of the company to the effect that the natural

gas supply was becoming exhausted and that insufficient reserves had been set up to protect the investment in this line. Even though the authority prayed for in that case was granted the company did not immediately set up amortization for that purpose which was allowed by the order of the commission which had then issued, but when the company found itself again before the commission in this rate proceeding they reasserted their claim to such an allowance. In the meantime, the basis for granting the original order of amortization, that is the belief that the supply of natural gas was becoming exhausted, had disappeared. This fact is recognized by counsel for appellant in its brief at page 11 (appellant's brief, p. 11) when it says:

> "The fact is not shown by the evidence in this case but it is true, as claimed by the commission, that at the present time there are large quantities of natural gas being transported into Ohio."

As a matter of fact, counsel for the company is not quite correct when it says that there was no evidence in the record to show an adequate supply of natural gas available to it for witness Allensworth testified to the effect that the transmission line here under discussion reached an existing adequate supply of natural gas. (R., 198.) Certainly, in view of the facts, their could be not the slightest justification for the allowance of an amortization charge for the purpose of retiring this transmission line, which has an anticipated life almost indefinite as to length and which the company, through witness Curtin, its president, admits is in 100% condition. (R.,

168.) The fallacy of the plaintiff's contention for the allowance of this charge becomes even more apparent when it is considered that the maintenance of this transmission line is borne by the Ohio Fuel Gas Company under and by virtue of the terms of its contract with the West Ohio Gas Company providing for the sale of gas to the West Ohio Gas Company. In addition to that the entire value of the line allocable to Lima is included in the base of $1,751,288.90 fixed by the commission as the value of the depreciable property on which the allowance of 1.4% as an annual depreciation charge was computed.

So that the net result of the company's contention is that because the commission in 1924 authorized it to amortize its transmission line because of the then existing belief that the supply of natural gas was almost exhausted, a belief that has long since been exploded, that it should now be allowed to include in its operating expenses for the purpose of justifying its rates the amortization charge originally authorized by the commission and which it failed to make at that time and that contention is advanced in spite of the fact that it is admitted that the transmission line is now used and useful, is in almost perfect condition, has an indefinite future life, is maintained by another company, and the value of the line is included in the base upon which their annual depreciation is allowed. The argument of the company in this connection simply illustrates the length to which the company is willing to go in an attempt to justify a very high price for a comparatively poor grade of gas. The

finding of the commission which was affirmed by the court is well stated in the commission's opinion (Commission Opinion, R. 94, 95) in the following language:

"Amortization

"The company claims that by virtue of an order issued by this commission in Case No. 179, decided 1924, it should be permitted to amortize the pipe line running from Kenton and other points to and beyond the city of Lima at the rate of $23,416.00 per year.

"This pipe line has been in use for more than thirty years. It is of wrought iron, with a very long life.

"When the order referred to was issued by this commission, there was every reason to believe that the natural gas supply going into this transmission line would soon exhaust itself. Such a development would have eliminated much of the usefulness of the transmission line, and it was only fair and reasonable that some provision should have been made at that time for the amortization of that line.

"As indicated above, the subsequent developments in the gas industry in this state and elsewhere, have proven beyond reasonable doubt that there is now available an adequate supply of natural gas."

"This amortization charge is therefore eliminated in this case. There is no cause to fear or expect a shortage of natural gas, and the mere fact that conditions at one time warranted a provision for such amortization is not sufficient to cause this commission to now sanction such a charge."

We submit, therefore, that the action of the commission in refusing to allow the amount claimed by the company relative to this item was not only reasonable but that any other action on the part of the commission would have been entirely improper.

III.

THE RATE OF RETURN.

A rate of return approximating 6% for the period 1928-1931 inclusive upon a valuation base as of March 31, 1928, of a property with a physical capacity far in excess of the needs of the community served is a fair and adequate rate of return and is in no event confiscatory. In fact in light of the circumstances presented, a lower rate of return would be justifiable.

Upon the basis of the valuation and operating expenses as allowed by appellee, the appellant's rate of return was slightly less than 6%. Appellant insists that a return of at least 8% is necessary if confiscation of its property is to be avoided. (Appellant's brief, page 148.)

There are but few instances in this case where we find ourselves in accord with counsel for the company, but we are inclined to agree whole-heartedly with them when referring to the decision of this court in the case of *Smith v. Illinois Bell Telephone Company*, 282 U. S., 133, they state, at page 148 of their brief (Appellant's Brief, page 148), "The final decision reasserts the sound fundamental that in a confiscation case rate of return is not a matter to be decided by a blind application of a percentage, but by a study of the situation of the company whose rates are under attack." Of course this statement is but a recognition of the principle laid down by this court in *Bluefield Waterworks and Improvement Company v. Public Service Commission*, 262 U. S., 679, 67 L. Ed.,

1176, wherein it was said: "What annual rate will constitute just compensation depends upon many circumstances and must be determined by the exercise of a fair and enlightened judgment having regard to all relevant facts."

It is upon the basis of the circumstances of this case that we assert that a rate of return of approximately 6% is adequate and non-confiscatory and that a lower rate of return could in all propriety be sustained.

It must be remembered that the West Ohio Gas Company, insofar as its furnishing gas in Lima is concerned, consists of a combination of two former companies, both of which furnished gas to Lima prior to 1924. (R., 149, 206, 207.) The one company being equipped to furnish an artificial gas, having a complete distributing system and a manufacturing plant for that purpose, and the other company being equipped for furnishing natural gas, owning a distribution system and a transmission line through which gas could be brought to Lima. (R., 146, 229, 239, 245.) With the organization of the West Ohio Gas Company, these properties were combined (R., 215) and we believe the evidence is indisputable to the effect that they represent a gas producing capacity far in excess of the needs of the community which they serve. (R., 201, 204, 205, 206, 248, 249, 265, 292, 301, 427, 428.)

As a matter of fact the evidence is that either the artificial plant or the natural gas facilities is adequate to supply the needs of Lima (R., 198, 409, 204, 205, 206, 248, 249, 292, 427) and in view of the comparatively poor grade of gas which is produced by the present company

through a mixing process, and in view of the further fact that the transmission line extending east of Lima, is connected with an adequate supply of natural gas and has an ample capacity to supply Lima with natural gas, there would have been every justification, had the commission so desired, for excluding the manufacturing plant from the rate base. In *Los Angeles Gas and Electric Corporation v. Railroad Commission of the State of California*, 289 U. S., 287, this court held in paragraph 12 of the syllabus:

> "A plant for manufacturing gas, which by reason of the fact that an abundant and constant supply of natural gas has become available, is no longer required, is improperly included without deduction for disuse in estimating the reproduction cost of a gas company's property."

The only evidence of any deduction at all for the over-capacity of this plant was contained in the testimony of Witness Dabe (R., 301) to the effect that a deduction of 15% had been made. The negligible effect of this deduction will be recognized when the general testimony of over-capacity is considered to the effect that the excess capacity of the manufacturing plant alone ranged any place from 50% (R., 248) to 100% (R., 204) more than the requirements of the city of Lima and this without respect to the fact that the transmission line for the purpose of providing natural gas is sufficient to supply twice the requirements of Lima (R., 427) without the manufacturing plant being included at all. Yet the company insists that upon a valuation base including *both*

the manufacturing plant with its excess capacity and the natural gas transmission line and distributing system with its excess capacity, they must have a return of at least 8% to avoid confiscation. Little consideration apparently is given by the company to the gas consumers of Lima, who are paying an excessively high rate for gas of an inferior quality, and a rate much higher than is being collected in other communities similarly situated. (R., 273.) As a matter of fact a rate which averages $1.29 for the first M c. f. for a mixed gas, which has only slightly more than 50% of the heating content of natural gas, is even more prohibitive than at first appears, for the gas consumer is compelled to buy a greater quantity of gas to get the same heating content.

It will be conceded, we believe, that the cost of manufacturing the mixed gas produced by the plaintiff is apimately 36¢ per M c. f. We believe it will likewise be recognized that the average rate for the first M c. f. of gas consumed is $1.29 and that the expense of distribution, including return on investment, is 93¢. When this distribution expense is compared to the distribution expense of 16¢ plus per M c. f. approved by this court in the case of the *Columbus Gas and Fuel Company v. Public Utilities Commission of Ohio,* 292 U. S., 398, 78 L. Ed., 1327, and with a distribution expense of less than 20¢ per M c. f. approved by this court in the case of *Dayton Power and Light Company v. Public Utilities Commission of Ohio,* 292 U. S., 290, 78 L. Ed., 1267, the question naturally arises as to why it should cost five times as much

to distribute gas in Lima, Ohio, as it costs to distribute gas in such communities as Columbus, North Hampton, Piqua, Sidney, South Charleston, Tippecanoe City, Washington C. H. and Wilberforce, Ohio. At least one solution to the problem immediately presents itself and that is that the cost of gas in Lima is so prohibitive as to prevent consumption, and as a result the distribution costs are higher per person than they would be were there more consumers.

At least one of the company's counsel recognized this fact when he made the following statement in the hearings before the commission: (R., 407.)

> Mr. Marshall: "Well I am not going to make any bones about it. I always stated to them in all this litigation that I thought their rate was going to be prohibitive. I think it is proved now that it was. That was the history of it. They had the gas business and we couldn't do anything else."

These are circumstances which certainly should be recognized in determining what constitutes a fair rate of return, for as early as 1898 this court held, in the case of *Smyth v. Ames,* 169 U. S., 464, 42 L. Ed., 819, 18 Supreme Court, 418, that: "Railroad rates should be fixed with reference to the fair value of the property used and services rendered and not merely to pay expenses, interest and dividends, nor in order to realize profits upon an excessive valuation or a fictitious capitalization," and "the public have a right to be exempt from unreasonable exactions and the interest of the corporation is not the sole test of suitable rates."

And in *Whitten and Wilcox, Valuation of Public Service Corporations*, Second Edition, 1928, Vol. 1, Sec. 60, page 77, is found the following:

> "A public utility is entitled to charge rates that will yield a reasonable return upon a 'fair value' of the property devoted to public service *provided such a return can be earned by rates which are reasonable from the viewpoint of the worth of the service.*" (Italics ours.)

In further support of this proposition see

Re *Los Angeles Gas & Electric Corporation*, P. U. R., 1917F, 717;
Re Coast Counties Gas & Electric Co., P. U. R., 1924C, 415;
In Benicia v. Benicia Water Co., (1923) 23 Cal. R. C. R., 213;
Re Colorado Springs Light, Heat & Power Co., P. U. R., 1916E, 650;
Belleville v. St. Clair County Gas & E. Co., P. U. R., 1915F, 235; P. U. R., 1916B, 24;
Re Central Illinois Public Service Company, P. U. R., 1919E, 910;
Re Illinois Gas Company, P. U. R., 1921B, 430;
In Re Kampsville Electric Light & Power Co., (1921) 1 Ill. C. C. R., 51;
Re Indiana Fuel & Light Company, P. U. R., 1921E, 381;
Re Castine Water Company, P. U. R., 1924B, 529;
Re United R. & Electric Co., P. U. R., 1928C, 604;
Donham v. Public Service Commission, P. U. R., 1919C, 880, 232 Mass., 309, 122 N. E., 397;
Re Citizens Telephone Company, P. U. R., 1931C, 162;
Re Nashville R. & Light Co., P. U. R., 1929A, 664;
Department of Public Works ex rel. Friday Harbor v. Friday Harbor Light & P. Co., P. U. R., 1928E, 660;

Re Wisconsin Traction, Light, Heat & P. Co., P. U. R., 1919B, 224;
Re Interstate Light & P. Co., P. U. R., 1921E, 161;
Re Duluth Street R. Co., P. U. R., 1928B, 228;
Re Milwaukee Electric R. & Light Co., P. U. R., 1930C, 426;
Re Community Teleph. Co., P. U. R., 1931C, 285.

Another circumstance that must be considered in reaching a determination as to what would constitute a fair rate of return to appellant is found in the fact that the fair valuation of appellant's property was made on the basis of prices existing as of March 31, 1928. The ordinance was for the five-year period following. Certainly it will be recognized that the real value of appellant's property has been less in each succeeding year of the period. The record discloses that the extent of the decline during the ordinance period in prices of items making up the valuation of the company's property was as great as 25%. (R., 478, 511, 512.) Even the witness produced by the company reluctantly admitted a decline in the price level affecting the valuation. (R., 490.)

But in spite of all these factors, counsel for the company doggedly insist that any return less than 8% will result in confiscation of the company's property. Perhaps the appellant does not realize that during the past few years profound economic changes have taken place and that a 5% return now has about the same purchasing power as an 8% return formerly possessed. In *Los Angeles Gas and Electric Corporation v. Railroad Commission, supra,* is found the following statement:

"But we know that the estimates of present value, taken as the cost of reproduction as of December 31,

> 1929, based upon average prices from 1926 or 1927 to 1929, furnished no dependable criterion of values in the succeeding years. The country was facing a most serious decline in prices. It was entering upon a period of such depression as to constitute 'a new experience to the present generation.' It was not the usual case of possible fluctuating conditions but of a changed economic level. *Atchison, T. & S. F. R. Co. v. United States,* (1932) 284 U. S., 248, 260, 262, 76 L. Ed., 273, 52 S. Ct., 146. * * *"

In the even more recent decision of this court in *Dayton Power and Light Company v. Public Utilities Commission of Ohio, supra,* the twenty-fourth paragraph of the syllabus held as follows:

> "24. The Supreme Court of the United States takes judicial notice of business conditions."

In carrying out the mandate of this court in *Smith v. Illinois Bell Telephone Company,* 282 U. S., 133, 75 L. Ed., 255, the lower federal court in Illinois took "judicial notice relative to the general decline in corporate earnings during the years 1931 and 1932," and held that 6½% was a proper rate of return for 1931 and 5% a proper rate of return for 1932. *Illinois Bell Telephone Company v. Gilbert,* 3 Fed. Supp., 595 (1933).

Courts and commissions generally have recognized that during a financial depression of unparalleled proportions, utilities are not entitled to a rate of return equal to that which might be proper in more prosperous times. See *Re Yonkers Railroad,* P. U. R., 1933B, 61 (1932) (New York Public Service Commission); *Re Kentucky-Tennessee L. & P. Company,* P. U. R., 1932E,

386, 392 (Tenn.); *In Re Chesapeake & Potomac Telephone Co.*, P. U. R., 1933E, 193 (P. U. C. of D. C.); *In Re Northwestern Electric Company*, P. U. R., 1933A, 493 (1932) (Oregon Commission); *In Re West Coast Tel. Co.*, P. U. R., 1933A, 487 (1932) (Washington Department of Public Works); *Re Lone Star Gas Company*, P. U. R., 1933C, 1 (Oklahoma Commission); *City of Charleston v. Public Service Commission*, P. U. R., 1931E, 74 (1931) (West Va. Supreme Court of Appeals); *Kankakee Water Co. v. Gilbert*, P. U. R., 1933B, 145 (1933) (U. S. D. C. E. D. Illinois); *Ohio Associated Telephone Co. v. Frank W. Geiger*, 3 Fed. Supp., 997, P. U. R., 1933E, 491 (1933). This is really but a recognition of the fact that a fair rate of return varies with periods of time and economic cycles.

In recognition of this change in business conditions generally, a three judge federal court, sustaining a decision of the Ohio commission, has said in *Ohio Associated Telephone Co. v. Frank W. Geiger*, 3 Fed. Supp., 997, P. U. R., 1933E, 491 (1933), at page 999 (Fed. Supp.):

> "Still other decisions of the federal courts have approved rates of return well under 6%. A statutory district court recently held that under existing generally depressed industrial and financial conditions there is no warrant in finding that a probable return of 5.17% is confiscatory. *Kankakee Water Company v. Gilbert*, U. S. District Court, Eastern Division of Illinois (January 6, 1933)."

Ever since *Bluefield Water Works Company v. Public Service Commission of West Virginia*, 262 U. S., 679, 692 (1922), it has been the law that:

> "A public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties; but it has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures."

While they represent merely an application of the long settled law that a fair rate of return varies with periods of time and economic cycles as well as with sections of the country and other factors, the recent decisions of the Supreme Court of the United States well illustrate the fact that the necessary and proper result of the application of the law is to reduce the fair rate of return for utilities in times of economic depression such as has prevailed throughout the life of the ordinance under consideration.

Los Angeles Gas and Electric Company v. Public Service Commission, 289 U. S., 287, 319 (1933);
Wabash Valley Electric Company v. Young, 287 U. S., 488-501 (1933);
Smith v. Illinois Bell Telephone Company, 282 U. S., 133, 75 L. Ed., 255 (1930);
Dayton Power and Light Company v. Public Utilities Commission of Ohio, 292 U. S., 290, 78 L. Ed., 1267 (1934);
Columbus Gas and Fuel Company v. Public Utilities Commission of Ohio, 292 U. S., 398, 78 L. Ed., 1327 (1934).

And yet in spite of all these facts appellant insists upon an 8% rate of return upon a valuation made on the basis of 1928 prices of a property whose capacity far exceeds the needs of the community it serves.

In the last analysis the thesis of appellant's argument on the subject of rate of return seems to rest in the cost that it has allegedly experienced in obtaining funds. We have previously pointed out in this brief that on the organization of the appellant in 1924 it issued $750,000 in preferred stocks, $1,626,381 in common stocks and $1,000,000 in bonds (R., 396, 398) and that the preferred stock and common stock was sold to or acquired by Midland Utilities Company of Chicago, the parent company of appellant. If the cost of marketing these securities was high the appellant's parent company would seem to be responsible. (R., 513.) As a matter of fact, the company issued securities totaling $3,376,000 on a finding of value of only $3,126,000. (R., 405.) Appellant comments at length upon the fact that its securities were issued upon a finding of value made by the commission. In that connection the following testimony is both interesting and illuminating (R., 406):

> "Commissioner Bricker: If you over capitalize your property do you think this commission ought to take it into consideration in the amount of the rate, would that be a loss to the rate payer?
>
> "Mr. Hebel: The capitalization of this company was passed upon by this commission—
>
> "Commissioner Bricker: Upon application of the company.
>
> "Mr. Hebel: Yes.

"Commissioner Bricker: And upon its own appraisal.

"Mr. Hebel: On whatever evidence was submitted. I don't know what evidence was before the commission. My understanding was that the commission had its engineers make an appraisal of the property at that time."

The statement of the commission at the close of its opinion in commenting on this subject is also of interest. The commission says: (R., 98, 122.)

"The company, in its case, claims that it has not been earning a fair return upon its property; that it has not been earning enough to set aside proper amounts for depreciation and amortization and, in general, the company sought to leave the impression that it was ekeing out a bare corporate living. These contentions lose much of their weight in the eyes of this commission when it is noted in the annual reports of this company that dividends on all classes of stock have been paid during the period involved; that fixed charges have been promptly met; that additions and betterments have been made to the property; that salaries, particularly of administrative officers, have not suffered greatly during the business depression.

It is not the province nor the aim of this commission to manage the West Ohio Gas Company, but it is felt that expenses of the company have not been reduced in line with the trend of the times.

It is the further feeling of this commission that the rate established herein is fair to both customers and company in view of the record of this case."

The fallacy of the contentions of the appellant are so apparent that further argument should not be necessary.

We submit that a rate of return of approximately 6% under the circumstances of this case is not only non-confiscatory but is generous and that as a matter of fact a lower rate of return could properly be sustained. It should be remembered further that the rate of return has been computed upon the basis of gross sales of gas resulting under the company's prohibitive schedule of rates which have been continued in effect throughout this litigation. In other words, the company has never had any experience under the rates ordered by the commission and if the economic law of increased sales resulting from lower prices is applicable, and we submit that it is, then the return to the company resulting from increased consumption would be materially increased.

IV.

THE ANNUAL REPORTS FOR THE YEARS 1928-1931, INCLUSIVE, FILED WITH THE COMMISSION BY THE COMPANY PURSUANT TO THE PROVISIONS OF THE OHIO STATUTES AND PUT IN EVIDENCE AS COMMISSION EXHIBITS 1, 2, 3 AND 4 BY THE ORDER OF THE COMMISSION ON ITS OWN MOTION.

On the eighth day of March, 1933, the commission made the following order: (R., 85.)

"Before the Public Utilities Commission of Ohio.

No. 5137.

(Title omitted.)

Order Placing Annual Reports in Evidence.

Upon the commission's own motion and for the purpose of completing the record herein, it is

Ordered, That the annual reports filed with this commission by the West Ohio Gas Company for the years 1928, 1929, 1930 and 1931 be, and hereby they are introduced in evidence and made a part of the record herein as Commission Exhibits 1, 2, 3 and 4.

The Public Utilities Commission of Ohio,

E. J. Hopple, Chairman; Frank W. Geiger, Charles F. Schaber, Commissioners.

Dated at Columbus, Ohio, this eighth day of March, 1933."

The company now contends that the use of any information contained in its annual reports placed in evidence by the foregoing order of the commission renders the entire rate order void.

These reports, (R., 636-816) duly verified by the president and secretary of the company, were filed with the commission in accordance with the provisions of Section 614-48 of the Ohio General Code.

No question as to the correctness of the information contained in these reports is raised by the company nor does it contend that the data contained therein would not constitute proper evidence in the case. (Appellant's brief, p. 56.)

We are likewise unable to find in appellant's brief any statement as to the exact use of such reports that was made by the commission or how the appellant was prejudiced thereby.

To support its contention appellant cites numerous cases where orders were made upon the basis of evidence *not introduced in the record.* Appellant does not challenge the fact, however, that here the reports were placed in the record by an order of the commission formally entered and that pursuant to the provisions of the Ohio statutes (G. C., 499-15) the commission was authorized to resort to the information contained therein.

The complaint of the appellant rests then not in the fact that these annual reports were not put in evidence for it admits that they were (appellant's brief, p. 57) but upon the fact that they were made a part of the record after the formal hearings had been completed.

The company does not challenge the authenticity of the information contained in these reports nor do they contend that any use of that information was prejudicial to them yet appellant naively suggests that it is not seeking

to advance any point of mere technicality. (Appellant's brief, p. 69.) No, it simply desires that a rate order made after years of hearings and delay, with great expense to the company, the city of Lima and the commission, be declared void because it disapproves of the method by which its annual reports were introduced into the record of this case without alleging in any particular how the information contained therein was used by the commission or that it was prejudiced thereby.

The appellant does not claim any injury from the introduction of any of the annual reports in evidence by the commission. It simply objects conditionally to the method of their introduction.

In *Snyder v. Massachusetts,* 291 U. S., 97, 78 L. Ed., 674, at p. 116-117, this court speaking through Mr. Justice Cardozo made the following statement:

> "Due process of law requires that the proceedings shall be fair, but fairness is a relative not an absolute concept. It is fairness with reference to particular conditions or particular results."

and in this same case Mr. Justice Roberts in the dissenting opinion (291 U. S., 127) says:

> "The concept of due process is not technical. Form is disregarded if substantial rights are preserved."

Certainly appellant does not insist that the introduction in evidence of this case of its annual reports, the content of which it does not challenge, impairs any of its substantial rights or violates the due process clause of the constitution.

A conclusive answer to appellant's contention is found in its application for a rehearing before the commission, par. 41 of which is as follows: (R., 109-110.)

> "41. Since the termination of hearings, and the closing of testimony, in this cause, the commission has, under date of March 8, 1933, on its own motion ordered that the annual reports filed by petitioner with the commission for the years 1928, 1929, 1930 and 1931 be made a part of the record in this cause as Commission Exhibits 1, 2, 3 and 4. Petitioner objects to such arbitrary placing of said reports in evidence as a part of the record in this case, unless there is also made a part of said record and placed in evidence by the commission the annual report filed with this commission by petitioner for the year 1932. Said 1932 report of petitioner was filed with the commission on or about March 1, 1933, and was on file with the commission at the time it entered its said order of March 8, 1933, above referred to."

It will be observed that in its petition for rehearing before the commission the sole basis of its objection to the inclusion of its annual reports in the record was because the report for 1932 was not included. The 1932 report was not used because the commission finding had been prepared on the basis of the four years 1928-1931, inclusive, and the 1932 information was not available when this preparation was in process and did not become available until ten days before the finding of the commission issued, and yet the only objection which appellant raises in its application for a rehearing to the inclusion of the annual reports in the record is predicated upon the failure of the commission to include the 1932 report and not upon the fact that any information con-

tained in the other reports was not correct or proper or that they desired to challenge any of the information therein contained.

The appellant's petition for a rehearing filed with the commission (R., 100-110) does not allege that the annual reports were not introduced in evidence. It does not allege that it was injured or prejudiced thereby. It does not attack any of the information contained in the reports. It does not seek to challenge any of the information contained in the reports, and it objects to their introduction solely because the report for 1932 was not included.

Under the Ohio statutes, (General Code, 543) it is provided that

> "• • • No cause of action arising out of any order or decision of the commission shall accrue in any court to any corporation or person unless such corporation or person shall have made, before the effective date of said order or decision, application to the commission for a rehearing. Such application shall set forth specifically the ground or grounds on which the applicant considers said decision or order to be unreasonable or unlawful. No corporation or person shall in any court urge or rely on any ground not so set forth in said application. • • •"

The appellant in its application for a rehearing before the commission did not urge that the annual reports had not been placed in evidence but, on the contrary, admitted that "the commission has, under dates of March 8, 1933, on its own motion, ordered that the annual reports filed by petitioner with the commission for the years

1928, 1929, 1930 and 1931 be made a part of the record in this cause as Commission Exhibits 1, 2, 3, and 4" and requested only that the report for 1932 also be included (R., 109), but when it filed its application for a rehearing in the state court it then for the first time alleged that the reports were not properly in evidence. (R., 37.)

It is apparent that the citations of appellant are not applicable to the facts here presented and that its contention that the rate order is void is untenable.

V.

VARIOUS OTHER CONTENTIONS ADVANCED BY APPELLANT.

1. The Contention that the Court Erred in Not Finding that the Validity of the Rate Order Must Be Determined by its Effect on Net Earnings from Year to Year; and that the Rate Order and the Order to Refund were Invalid Because this Requirement had Not Been Complied With.

The appellant in its discussion of this topic seems to lose entire sight of the fact that the rate under consideration in this case is an ordinance rate covering a five year period and that the question before the commission was whether or not this ordinance rate would produce during the period a reasonable rate of return to the company upon the basis of the fair valuation of its property. The commission in its finding determined that upon the basis of the valuation of the company's property as of

March 31, 1928 the ordinance rate would not be sufficient to produce such a fair return. It, therefore, substituted for the ordinance rate, pursuant to the authority granted to it so to do by the Ohio statutes (G. C. 614-46), a schedule of rates which, in the opinion of the commission, would, for the entire period of the ordinance, yield the company a fair and reasonable return upon the valuation of its property as of March 31, 1928. (Commission Order, p. 1, R., 86.) At the time the commission order was made the ordinance period involved had practically expired and the finding of the commission was based upon an allowance to the company of a rate sufficient to produce a fair return to the company over the entire ordinance period. That such a result was accomplished is illustrated by the fact that the return to the company upon a valuation made in 1928, and upon the basis of prices then existing, would for the succeeding four years of the ordinance for which the commission had complete figures available at the time it rendered its opinion, have yielded to the company an average return of not less than 5.75%, and that for the particular years involved it would have earned during the year 1928, upon the basis of the commission's rates, a return of 6.37%, and in the year 1929 a return of 5.78%, and for the year 1930 a return of 5.88%, and for the year 1931 a return of 4.99%. The company contends very strenuously that the commission did not take into consideration general economic conditions subsequent to 1931 which they argue had reduced the revenues for 1932 below that of previous years. It is rather interesting to find the company in-

sisting upon a recognition of economic conditions as reducing their revenue while at the same time they are insisting that the valuation made during a period of very high prices shall continue undisturbed and that they shall continue to earn a pre-depression return upon the basis of a high valuation.

In this connection we should like to refer to what, to us, appears to be a rather strong admission on the part of the appellant, in the light of its contentions throughout this case, which will be found at page 53 of the appellant's brief. (Appellant's brief, p. 53.) This statement is as follows:

> "When these clearly demonstrated errors of the accountants are corrected, and rate case expense is taken into account and spread over the ordinance period, the return earned by the company under the commission rates (even after eliminating for each annual period the more than $71,500.00 of operating expense that were excluded by the commission) would average less than 5½% for the first four years of the ordinance period, and but about 5¼% for the whole ordinance period."

In other words, the company admits that for the entire five year period of the ordinance and including an allowance for rate case expense in its operating expenses it has earned a return of 5¼% upon a valuation of its plant at a price level existing on March 31, 1928.

2. The Contention that the State Supreme Court Erred in Not Holding that the Rate Order Is Invalid Because the Commission Refused to Grant the Company a Rehearing, Suitably Requested.

The company's appeal from the ordinance passed by the city of Lima on March 19, 1928 was before the Public Utilities Commission of Ohio for a period of more than four years. When the decision of the commission was finally made four years of the ordinance period had elapsed and the commission was in possession of almost complete information as to the experience of the company for the entire ordinance period. Much of the complaint that is directed against administrative commissions in rate proceedings is because of the delay in the making of a decision. After this decision of the commission was finally reached the company then insisted that a rehearing should be granted for the purpose of introducing certain evidence as to its experience in the fifth year of the ordinance period which, they admit, was not available to the commission at the time of its decision. To have granted this rehearing upon the basis of this contention alone would have been to further delay the matter without any sufficient reason being shown therefor. While the company contends that there was a considerable falling off in its revenues in 1932 its annual report on file with the commission, and a public document, does not sustain that contention and the company itself in its statement in its brief at page 53 (appellant's brief, p. 53) admits that if the 1932 experience of the

company had been included it would have reduced the rate of return for the entire period less than ¼ of 1%.

It should be perfectly obvious that if the commission had reached a decision at the end of the first year of the period of the ordinance that a rehearing could not be granted to the company merely because the remaining four years of the ordinance period had not yet elapsed and it wanted to show its experience under the succeeding four years and that that was a sufficient basis for the granting of a rehearing. As a matter of fact the commission delayed more than a reasonable time in reaching a decision, as it was, and to have granted a rehearing would merely have extended this delay a longer period of time without sufficient justification.

3. The Contention that the State Supreme Court Did Not Make that Independent Judicial Review of the Law and the Facts Which Due Process and Equal Protection of the Laws Require.

This contention seems to be a part of the recognized formula followed by all utilities when appeal is taken to this court. It was urged in the case of the *Columbus Gas & Fuel Company v. Public Utilities Commission of Ohio, supra,* and in the case of *The Dayton Power & Light Company v. Public Utilities Commission of Ohio,* supra.

In this particular case the Supreme Court of Ohio (*West Ohio Gas Company v. Public Utilities Commission of Ohio,* 128 O. S., 301) (R., 14-35) gave a very careful consideration to all of the problems presented. The

decision of the court is quite voluminous and shows a careful review of the record. To insist that the Supreme Court of Ohio did not make an independent judicial review of the facts is entirely without foundation.

In passing upon a similar contention raised in the case of the *Columbus Gas & Fuel Company v. Public Utilities Commission of Ohio,* supra, this court in paragraph 6 of the syllabus held as follows:

> "6. The Supreme Court of the United States, in reviewing a decision of a state court, will presume that testimony in the record was given due consideration."

The holding of this court in that very recent case (1934), we believe effectively disposes of this particular contention of the appellant.

CONCLUSION.

When it is recognized that the appellant would have earned under the rates prescribed by the commission during the first four years (1928-1931, inclusive) of the five year ordinance period for which complete data was available to the appellee at the time it prepared its opinion, an average annual rate of return of not less than 5.75% upon a valuation as of March 31, 1928, at 1928 prices on a property far in excess of the needs of the city of Lima, it is apparent that it has earned a rate of return that is not only non-confiscatory but is exceedingly fair. When it is recognized further that it has been able to maintain its property in almost perfect

condition, in addition to earning an average rate of return of 5.75% upon a 1928 valuation, we believe that it is apparent that the company has fared as well if not better than other businesses similarly situated during a period of profound economic depression.

The judgment of the court below should be affirmed.

Respectfully submitted,

JOHN W. BRICKER,
Attorney General of Ohio,
DONALD C. POWER,
Assistant Attorney General of Ohio,
Counsel for Appellee, the Public Utilities Commission of Ohio,
Columbus, Ohio, December 1, 1934.

APPENDIX A.

Explanations of Differences.

The company has devoted thirty-two pages of its brief, under its Appendix A, to the quotation of excerpts from various briefs previously filed in the state court, setting forth differences that arose from time to time between sundry amounts as calculated by the commission and as calculated by the company. All of these differences, except those objected to in the company's supplemental reply brief, have been adjusted and all argument in respect to the manner in which such disputed calculations were made has been closed. In most instances the commission acceeded to the company's viewpoints, admitting and correcting errors where they existed and waiving minor technicalities, and in other instances the company recognized the correctness of the commission's figures and methods, after voluminous objections and arguments. The commission deems it unnecessary to make detailed comment on the surplussage of data presented in the Company's Appendix "A", all of which resolves itself into the following differences, not heretofore composed.

At page 186A of its brief the company shows net income computed by the commission	$112,412
At page 183A of its brief the company shows net income computed accordng to its interpretation of the commission's methods	103,624
Entire net difference in Company's Appendix "A" not heretofore reconciled	$8,788

The above difference consists of three items, as follows:

1.	Fractional difference due to dropping cents	$ 1
2.	Cost of gas sold in Lima reduced by commission	2,997
3.	Rate case expense disallowed by commission	5,790
	Total difference	$8,788

In explanation of these items, the commission offers the following:

1. This fractional difference of $1.00 is of no consequence and is conceded by the commission. In eliminating cents to show results in even dollars, the company treated commercial expenses of $19,986.75 as $19,986 instead of $19,987 on page 183A of its brief.

2. This difference of $2997 in cost of gas sold has been checked and, while the commission can not concur exactly with the company's figure of $143,578, it concedes that it is more correct than the amount of $146,575 used by the commission for cost of gas sold in Lima. The effect of this difference is sixteen hundredths of one per cent on the average rate of return, and subject to comments which will follow, concerning Exhibit "B" attached, the commission waives this item in favor of the company.

3. This difference of $5790 in rate case expense is the entire amount claimed by the company which the commission disallows as an improper item to consider in the determination of a rate of return, which may or may not justify the disputed rates in respect to which the expense in question was incurred. The commission considers this treatment particularly justified where confiscation is the issue.

The attached Exhibit "A" has been prepared to show the final results of using figures of undisputed amount as computed by the commission and the company and it will be noted that these figures produce an average net rate of return of 5.75% for the period. It will further be noted that if consideration is given to items of forfeited discounts and the corrected computation of gas sold shown by Exhibit "B" attached, the average net rate of return will be 5.92% for the period. The only difference in the figures, entering into the net income on line 16 of the attached Exhibit "A", as computed by the commission and the company is the rate case expense of $5790 heretofore discussed.

In checking the cost of gas sold, the commission found that the amount of $146,575 included by the company on page 183A of its brief, was originally computed by the commission's accountant in connection with gas sales of $428,509 representing 390,369,625 cu. ft. of gas sold. This cost of gas sold, therefore amounted to 37.55¢ per M c. f. including leakage, on the cubic feet involved. Later, the commission accepted the company's correction of the sales and cubic feet sold in the amounts of $416,225 and 382,294,775 cu. ft. respectively. It appeared obvious from the data at hand that this reduction in cubic feet should cause a reduction in the cost of gas sold as well as in the revenues derived from the sale thereof and computations were accordingly made at 37.55¢ per M c. f. on the corrected 382,294,775 cu. ft. to produce a corrected cost of gas sold of $143,578. It now appears that there was some slip in the original calculations caused, as the company

claims, by misinterpreting data presented in its Exhibits No. 104 and 105, the ambiguity of which is admitted by the company at page 178 of its brief.

In an effort to ascertain the true cost of gas sold based upon figures presented by the company and apparently intended for use in the form presented, the attached Exhibit "B" has been prepared showing an average cost of $145,652 for the period. Effect to these figures has been given under Note "f" on Exhibit "A".

EXHIBIT A.

	Calculations Made or Accepted by Commission					Company's	Calculations
	Year 1928	Year 1929	Year 1930	Year 1931	Average 4 Years	Page Co. Brief	Average 4 Years
Quantity							
1. M c. f. of gas sold in Lima	395,423.3	399,309.5	380,297.5	354,148.8	382,294.8	a 179A ave.	382,294.8
Revenues							
e 2. Gross revenues from gas service in Lima under commission's rates	$432,097	$434,876	$412,995	$384,981	$416,225	183A	$416,225
Expenses							
3. Cost of gas sold	145,004	153,448	149,143	138,704	146,575	a 170B	146,575
4. Distribution expense	36,265	35,151	31,643	34,651	34,428	183A	34,428
5. Commercial expense	20,567	19,363	19,240	19,707	19,719	183A	19,719
6. New business expense	5,000	5,000	5,000	5,000	5,000	a 170B	5,000
7. General and miscellaneous expense	37,854	45,974	40,237	32,877	39,235	183A	39,235
8. Indirect charges to construction—Cr.	(1,827)	(2,588)	(8,400)	(2,401)	(3,804)	a 170B	(3,804)
9. Depreciation	24,518	24,518	24,518	24,518	24,518	a 170B	24,518
10. Real and personal property taxes	23,353	24,889	23,121	19,826	22,797	a 170B	22,797
11. Ohio excise tax	7,034	7,382	7,259	6,782	7,114	a 170B	7,114
12. P. U. C. O. tax	286	282	265	280	279	a 170B	279
13. Income tax	10,144	8,867	6,878	8,127	8,504	a 170B	8,504
14. Uncollectible accounts	2,768	2,753	2,228	2,034	2,446	a 170B	2,446
15. Total expenses	$310,966	$325,039	$301,132	$290,105	$306,811	b	$306,811
Net Income							
f 16. Net income, line 2 less line 15	$121,131	$109,837	$111,863	$94,826	$109,414	c	$109,414
Rate of Return							
f 17. Based upon commission's valuation of $1,901,696 as of March 31, 1928, and the net income shown on line 16	6.37%	5.78%	5.88%	4.99%	5.75%	d	5.75%

Note:

a. These items make up the amount of $213,429, shown in company's table on page 183A of its brief.

b. Company's brief, page 183A, shows total expenses of $312,601 which includes rate case expense of $5790 disallowed by the commission.

c. Company's brief, page 183A, shows net income of $103,624 after deduction for rate case expense of $5790 disallowed by the commission.

d. Company's brief, page 183A, shows rate of return of 5.45% which is .30% less than shown by the commission due to deduction of rate case expense.

e. In its Exhibit No. 104 the company shows revenue from forfeited discounts of $4598.54 during 1930 and $4213.11 during 1931 per transcript pages 534 and 535. The commission's rates shown on transcript page 86 also provide for a penalty of 5¢ per M c. f. for non-payment of bills within ten days. No consideration whatever has been given in the above rate study to revenues from these sources although they would doubtless influence the results to some extent.

f. If the cost of gas sold was computed according to Exhibit "B" attached and consideration was given to the company's revenue from forfeited discounts referred to in Note "e" the net income shown on line 16 and the rate of return shown on line 17 would be changed as follows:

Net Income:					
Per line 16 above	$121,131	$109,837	$111,863	$94,826	$109,414
Difference cost of gas sold, Exhibit "B"	(5,367)	318	2,856	5,886	923
Forfeited discounts	.....	.....	4,599	4,213	2,203
Adjusted net income	$115,764	$110,155	$119,318	$104,925	$112,540
Rate of Return:					
Computed on adjusted net income	6.09%	5.79%	6.27%	5.52%	5.92%

( ) indicates red figures.

EXHIBIT B.

THE WEST OHIO GAS COMPANY

COMPUTATION OF COST OF MIXED GAS SOLD IN LIMA BASED UPON COST DATA SHOWN IN COMPANY'S EXHIBITS AND INCLUDING 7% ALLOWANCE FOR LEAKAGE APPROVED BY COMMISSION

Page	Explanation	Line	1928	1929	1930	1931	Average	Territory	
	A—Cost of Gas Produced and Purchased:								
T-537	Total cost of mixed gas.....	1	$151,291	$160,430	$159,475	$160,882	$158,020	Lima	Distr.
	B—Cubic Feet of Gas Produced and Purchased:								
T-537	Total gas produced and purchased.	2	427,797,839	451,828,886	448,465,845	462,469,300	447,640,467	Lima	Distr.
	Less, gas used by company.....	3	2,077,300	4,185,300	4,840,000	3,479,700	3,645,575	Lima	Distr.
	Net cubic feet of gas distributed..	4	425,720,539	447,643,586	443,625,845	458,989,600	443,994,892	Lima	Distr.
*	C—Cost Per M C. F. of Gas Distributed: Cost, line 1 divided by cubic feet, line 4.....	5	35.54¢	35.84¢	35.95¢	35.05¢	35.59¢	Lima	Distr.
	D—Cubic Feet of Gas Distributed in Lima:								
B-179A	Total cubic feet sold.....	6	395,423,300	399,309,500	380,297,500	354,148,800	382,294,775	Lima	City
*	#Add, leakage allowed by commission at 7%.....	7	27,679,631	27,951,665	26,620,825	24,790,416	26,760,634	Lima	City
*	Total cubic feet distributed in Lima	8	423,102,931	427,261,165	406,918,325	378,939,216	409,055,409	Lima	City
	E—Cost of Gas Distributed or Sold in Lima:								
*	Cubic feet, line 8 times cost per M c. f., line 5.....	9	$150,371	$153,130	$146,287	$132,818	$145,652	Lima	City
	F—Cost of Gas Sold Used on Exhibit "A":								
	Per line 3 of Exhibit "A".....	10	145,004	153,448	149,143	138,704	146,575	Lima	City
	G—Difference—Cost of Gas Sold:								
	Excess of line 9 over line 10.....	11	5,367	.....	.....	.....	.....	Lima	City
	Excess of line 10 over line 9.....	12	.....	318	2,856	5,886	923	Lima	City

T—Refers to the transcript of the record.

B—Refers to the company's brief.

#—At page 95 of the transcript the commission considers leakage as "based upon the amount purchased and manufactured as compared to the amount distributed" and allows 7% but does not state whether this 7% is computed on and added to gas sold to produce gas distributed or is computed on and deducted from gas distributed to produce gas sold. The first interpretation has been used in the above computations.

*—This is the mathematical average for the four years. Based upon the average cu. ft., line 8, and the average cost per M c. f., line 5, this average cost would be $145,582.82.

APPENDIX B.

Under the above heading in its brief appellant contends that the opinion of the state court contains misstatements and inaccuracies. These contentions are not supported by the record.

1. The appellant objects to the following statement of the state court on page 304 of its opinion: (R., 17.)

> "In 1923 the two properties were combined, the Natural Gas Company securing permission from the Public Utilities Commission to furnish the city with a mixed fuel gas. By this method the physical plant of the Gas Light Company was added to the system of the Natural Gas Company, and the loss by obsolescence was avoided. These two combined systems, together with replacements and additions, constitute the gas properties now being operated in the city of Lima by the plaintiff in error gas company."

Permit us to refer the court to the following testimony from the record in this connection (testimony of the company witness Pringle: R., 214, 216.)

> "Q. Mr. Pringle, prior to December 1, 1924, there was operated in the city of Lima the Lima Natural Gas Company, was there not? A. Yes, sir.
>
> Q. And that company was engaged in furnishing fuel gas to the inhabitants of the city? A. It was.
>
> Q. And that is the company by whom you were employed? A. Yes, sir.
>
> Q. They had been in business there a great many years prior to that time? A. That is correct.
>
> Q. And there was at the same time another cor-

poration known as the Lima Gas Light Company? A. There was.

Q. And that company's business was the furnishing of illuminating gas in the city of Lima? A. That is true.

Q. Do you today furnish gas for any other purpose except fuel purposes? A. No.

Q. You do not. That is to say, the business of selling illuminating gas no longer exists? A. I suppose some few people around Lima may be using gas for lighting purposes but I don't know of any personally.

Q. You would be surprised if you saw one of those? A. Perhaps.

Q. How long has it been since the business of selling illuminating gas was no longer profitable? A. I can't recall, Mr. Light.

Q. It was before December 1, 1924, was it not? A. Yes.

Q. So that on December 1, 1924, the Lima Gas Light Company had an entirely obsolete plant? A. No.

Q. So far as the business of that company was concerned it was obsolete? A. From the standpoint of lighting, selling gas for illuminating purposes, you might speak of it in that way.

Q. From that standpoint it was ready to be charged off as an entirety? A. I think at that time you mentioned it was engaged in selling a certain amount of gas each month to the Lima Natural Gas who was distributing mixed gas product to its customers.

Q. That company had been organized many years before that and had a system of pipes, a distribution system in the city of Lima? A. Yes, sir.

Q. Was it as old a company as the Lima Natural Gas Company? A. I think it was organized before the Lima Natural.

Q. Both of them were 20 or more years old at that time? A. I would think so.

Q. On December 1, 1924, there was also a corporation known as the Wapakoneta Natural Gas Company? A. Yes, sir.

Q. And another one, the St. Mary's Gas Company? A. Yes, sir.

Q. And another one, the Celina Gas Company? A. Yes, sir.

Q. All separate corporations? A. Yes.

Q. All right. Now, on December 1, 1924, these properties were consolidated and are now owned by the West Ohio Gas Company? A. That is true.

Q. And there was a consolidation of properties of the Lima Natural Gas Company and the Lima Gas Light Company at that time? A. Yes, sir.

Q. And the present holder and plant that you now claim as useful property in this case was originally the property which came from the Lima Gas Light Company? A. Yes, sir.

Q. Beginning December 1, 1924, the properties of the Lima Natural Gas Company and the properties of the Lima Gas Light Company were then completed and used only for fuel purposes, furnishing gas for fuel purposes in the city? A. Yes, sir.

Q. Now, at that time how much did you charge off or abandon as property not used and useful, do you remember that? A. I do not recall.

Q. If I suggest the figure will you recognize it? Was it approximately $11,309.94? A. I haven't any idea, Mr. Light.

Q. Don't you know that that is approximately the amount? A. No, I really don't because the opening entry was made by somebody from Chicago.

Q. Well, if your books show it that would be correct, wouldn't it? A. Absolutely."

2. The appellant objects to the statement of the state court that the plant "admittedly has a capacity of practically two or three times the requirements of Lima" and

that "the commission did not reduce the valuation of this plant". (R., 18.)

In this connection we quote the following testimony: (Company witness Pringle, R., 204.)

> "Commissioner Bricker: Coming back just one question, you estimated that your plant is capable of producing gas to how many more consumers than you have at the present time?
>
> The Witness: I would say from my knowledge probably double.
>
> Commissioner Bricker: A hundred per cent more, then, than you are really serving at the present time. In other words, your plant is adequate to the needs of 20,000 consumers upon your present basis of use per consumer?
>
> The Witness: Yes, sir."

(R., 205):

> "Commissioner Bricker: What was the reason for building a plant twice the needs of the present time?
>
> The Witness: I don't know whether I could answer that, Mr. Bricker, as I wasn't directly associated with those that determined the capacity to which the plant might be increased. • • •"

(Company Witness Curtin, R., 248):

> "Commissioner Bricker: How many subscribers would your plant as it is now constructed in Lima accommodate?
>
> The Witness: Well, probably half as many more by pushing the—half as many more as we have got. • • •"
>
> Q. Well, I will ask you this question, Mr. Curtin, going to just what you have said. You say that the plant will accommodate perhaps a half more customers than you have right now today? A. If we were to crowd it."

In view of the fact that the gas consumption in Lima per day is slightly in excess of 1,000,000 cubic feet, (R., 261, 371) the following testimony is interesting: (Company Witness Lynch, R., 265.)

> "Q. This manufacturing plant's capacity is 3,000,000 cubic feet of gas per 24 hours? A. Yes, sir."

and at page 292 Mr. Light states: (R., 292)

> "Mr. Light: May I call the commission's attention to one further fact? The testimony before the commission is that the capacity of the artificial plant is three million cubic feet per 24 hours. The testimony is further before the commission that the use of this plant in Lima per annum is about two hundred million cubic feet, or we are getting in Lima less than a 20 per cent use of that plant."

In addition to the over-capacity of the manufacturing plant the following testimony was introduced as to the excess capacity of the transmission line used in bringing natural gas into Lima: (Witness Allensworth, R., 427.)

> "Q. I didn't intend to go into any detail. The Lima plant includes the transmission line 44 miles long which belongs as a part of the Lima plant and is used to transport natural gas to the city gates? A. With the qualification, yes, that is right.
>
> Q. And it also includes an artificial plant located within the city? A. Yes.
>
> Q. Both are included as a part of the used property of the West Ohio Gas Company at Lima? A. In the valuation by the commission, yes.
>
> Q. The transmission line is large enough to supply double the requirements of Lima? A. Yes.
>
> Q. And the artificial plant is large enough to supply three times the needs of Lima, either independent of the other? A. No, sir; I do not think it is

quite that large. I think it is one third too large to meet the requirements of Lima.

In other words, this testimony, a portion of which is quoted by the company in their brief at page 195 (appellant's brief, Appendix B, p. 195) is to the effect that the natural gas facilities are sufficient to supply twice the requirements of Lima and that in addition and above that the artificial plant is one-third too large to meet the requirements of Lima. The only evidence found in the record as to any reduction made at all by the commission for this very great over-capacity is found at page 301 in the following statement of Witness Dabe:

"No, sir; there has been a 15 per cent deduction there taken off for over-capacity of plant."

We believe that sufficient testimony has been quoted to show that the statement of the state court to the effect that the plant had an admitted over-capacity of at least two or three times the requirements of the community it served was clearly established. As a matter of fact, in the argument before the state court counsel for the appellant, in response to a question from Judge Allen, admitted that the capacity of the plant was in excess of the needs of the community.

3. Counsel is in error when it contends that the state court found a total production cost of the mixed gas of 32½¢ per M c. f. The court's finding in this respect is as follows: (R., 19.)

"The attempt of the gas company to compare its rates with those prevailing where gas is supplied

alone by an artificial gas plant is also unwarranted. Lima is being supplied with a diluted natural gas. This 32½¢ per thousand production cost represents the gas company's figures, but nevertheless to that the commission added 3½¢ to cover incidental cost before distribution and leakage during distribution, making a total of 36¢ per thousand as the production cost. Subtracting this from the retail price of $1.29 claimed by the gas company leaves 93¢ for distribution and profit, a service which was performed twenty years ago for 12¢. The cost of gas in this period has increased about sixty per cent."

4. The contention of appellant that the state court was in error in stating that the amount remaining for distribution expense and profit to the company was 93¢ per M c. f. (R., 19.)

The record discloses that the cost of producing mixed gas was 36¢ per thousand cubic feet: (R., 334, 335, 421.)

Company Witness Pringle: (R., 421.)

"Q. Your average cost of production is about 35 cents? A. Somewhere along there."

The average cost to the consumer for the first thousand cubic feet was found by the commission to be $1.29. This leaves 93¢ for distribution and profit. (Commission's opinion, R., 90.)

5. The appellant objects to the following statement of the court: (R., 16.)

"The claim is made that residents of the city of Lima pay more for their gas per thousand cubic feet than any other city of Ohio. This is denied. Comparisons are made by way of proof and disproof. These comparisons add volume to the briefs, but are of little, if any, aid to the court."

In this connection we quote the following statement made by Company Witness Curtin: (R., 273.)

"Commissioner Klinger: Mr. Curtin, may I ask you this question? Have you visited other towns in Ohio that are being served by other companies to see how they are being served and what it costs other communities to get the same kind of service that you are giving Lima?

"The Witness: Why, yes, in a general way, judge.

"Commissioner Klinger: Well, now, what did you discover, is it true or not true that the area that is served by your company has to pay much more than other communities quite similarly situated?

The Witness: Yes, sir.

Commissioner Klinger: How?

The Witness: Yes, sir."

6. The appellant objects to the statement contained in the opinion of the court at page 306 wherein the court refers to the fact that there is evidence that the heating content of the gas supplied by the company does not average over 475 British thermal units per cubic foot, instead of 550 British thermal units.

The testimony on this subject is found at page 188, et seq. of the record. We quote the following testimony: (City Witness Smith, R., 190.)

"Q. Mr. Smith, tell the commission whether or not you prepared City's Exhibits 9-a, -b, -c, -d and -e. A. Yes, sir.

Q. Tell the commission whether or not that contains the tabulation of your analysis or the result of your examination of the gas of the West Ohio Gas Company at Lima, Ohio, as of the dates set forth in the exhibit. A. Yes, sir.

Q. What could you say to the commission as to

that being correct? A. I consider those adequate results.

Q. What do you mean by that? A. I mean that the examinations as shown in the report, estimations of the heating value of gas as used at our purification plant, are sufficiently precise to be comparable to any other results of the same type.

Commissioner Klinger: Is that a laboratory test?

The Witness: Yes, sir; it is a calorimetric test.

Chairman Geiger: You needn't examine your own witness. They will cross examine him. What does it show?

Mr. Light: It averages about 475.

Chairman Geiger: Let the witness answer. What does it average?

The Witness: The annual average for the part of '28 and '29 practically daily tests was 476 British thermal units per cubic foot."

City Exhibits 9-a, -b, -c, -d and -e are found in the record at page 568 to 572, inclusive.

7. The appellant objects to the following statement found on page 304 of the opinion of the state court:

> "In December, 1924, on the occasion of the transfer of the assets to the West Ohio Gas Company, the commission authorized the issuance of $3,376,000 of bonds and preferred stock securities." (R., 17-18.)

Permit us to quote from the record: (Company Witness Pringle, R., 405, 406.)

> "Q. That is, you issued securities of $3,376,000 and the Public Utilities' finding of value was $3,126,000? A. Yes.
>
> Q. Or $250,000.00 difference? A. Yes, sir.
>
> Q. Which you added as an asset on your books? A. The amount of $3,376,381 is the amount that appears on our books."

stock was sold to the Midland Utilities Company at 87½ per cent, the price fixed by the commission."

And at page 403: (Witness Pringle, R., 408.)

"Q. Is December the first, 1-24 the date of the purchase of these properties by the Insull interests? A. What is it?

Q. What is the date of the acquisition of these properties by the Insull interests? A. No, the Insull interests controlled the several separate and distinct corporations prior to December 1, '24, but December the first, '24—

Q. So that the West Ohio Gas Company was a reorganization of properties already held by the Insulls? A. Yes, sir."

And finally at p. 218: (Witness Pringle, R., 218.)

"Chairman Geiger: Well who owns your common stock?

The Witness: The Midland Utilities Company of Chicago.

Chairman Geiger: And who owns the stock of the Midland?

The Witness: I don't know.

Chairman Geiger: Are you in any way affiliated either with the Ohio gas company or the Columbia?

The Witness: No connection whatsoever. The Midland Utilities is an Insull organization.

Chairman Geiger: What organization is your company in?

The Witness: In the Midland Utilities. We are controlled by the Midland of Chicago.

Chairman Geiger: Well, it is a larger group yet?

The Witness: The Insull organization."

And yet counsel for the appellant at page 201 of its brief (appellant's brief, Appendix B, p. 201) says "the statement that the stock was sold to another Insull company" is incorrect.

APPENDIX C.

Applicable Statutory Provisions.

General Code of Ohio, Section 499-15:

"For the purpose of ascertaining the value of the property of every public utility or railroad in this state, including municipally owned or operated utilities, the commission may cause a hearing or hearings to be held at such time or times and place or places as the commission may designate. Before any hearing is had, the commission shall give the public utility or railroad affected thereby, or if the whole or the major portion of said utility or railroad is situated in any municipality, then to the mayor of such municipality, at least thirty days' written notice specifying the time and place of hearing, and such notice shall be sufficient to authorize the commission to inquire into the matters designated in this section, but this provision shall not prevent the commission from making any preliminary examination or investigation into the matters herein referred to, or from inquiring into such matters in any other investigation or hearing. All public utilities or railroads affected, and any municipality in which the whole or the major portion of said utility or railroad is located, shall be entitled to be heard and to introduce evidence at such hearing or hearings. The commission is empowered to resort to any other source of information available. The evidence introduced at such hearing shall be reduced to writing and certified under the seal of the commission."

General Code of Ohio, Section 543:

"* * * No cause of action arising out of any order or decision of the commission shall accrue in

any court to any corporation or person unless such corporation or person shall have made, before the effective date of said order or decision, application to the commission for a rehearing. Such application shall set forth specifically the ground or grounds on which the applicant considers said decision or order to be unreasonable or unlawful. No corporation or person shall in any court urge or rely on any ground not so set forth in said application."

General Code of Ohio, Section 614-44:

(See appellant's brief, Appendix C, p. 204.)

General Code of Ohio, Section 614-45:

"No such complaint or appeal to the commission shall suspend, vacate, or set aside the rate, price, charge, toll or rental fixed by ordinance unless such public utility shall elect to charge the rate, price, charge, toll or rental in force and effect immediately prior to the taking effect of the regulation complained of and appealed from and shall give an undertaking in such amount as the commission shall determine. * * * The condition of the undertaking shall be that such public utility shall refund to each of its consumers, public or private, the amount collected by it in excess of the amount which shall finally be determined it was authorized to collect from such consumers."

General Code of Ohio, Section 614-46:

(See appellant's brief, Appendix C, p. 205, et seq.)

General Code of Ohio, Section 614-48:

"Every public utility shall file with the commission, at such times and in such form as it may prescribe, an annual report, duly verified, covering the yearly period fixed by the commission. The commission shall prescribe the character of the information to be embodied in such annual report, and shall furnish to each public utility a blank form therefor. If any such report is defective or erroneous, the commission may order the same to be amended within a prescribed time. Such annual reports shall be preserved in the office of the commission. The commission may, at any time, require specific answers to questions upon which it may desire information."

General Code of Ohio, Section 3982:

(See appellant's brief, Appendix C, p. 207.)

General Code of Ohio, Section 3983:

(See appellant's brief, Appendix C, p. 207-208.)